



General Assembly

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United Nations Commission on International Trade Law

Thirty-fourth session

Summary record of the 716th meeting

Held at the Vienna International Centre, Vienna, on Wednesday, 27 June 2001, at 2 p.m.

Chairman: Mr. Pérez-Nieto Castro(Mexico)

Contents

Draft Convention on Assignment of Receivables in International Trade (*continued*)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum.

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The meeting was called to order at 2.20 p.m.

Draft Convention on Assignment of Receivables in International Trade (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4 and A/CN.9/491 and Add.1)

Annex to the draft Convention (continued)

Section IV: Priority rules based on the time of notification of assignment (continued)

1. **Mr. Bazinas** (Secretariat) confirmed that the proposal made by the observer for the Republic of Korea at the previous meeting was not necessarily to reproduce article 7 *bis* in section IV. It had been made for the sake of the balance of the text: if a rule of evidence concerning the time of the conclusion of a contract was included in section III, it might be necessary to include in section IV a similar rule of evidence concerning the time of notification. It might also be preferable to state that the time at which a contract of assignment was made could be evidenced by any means, not necessarily in writing, on the assumption that for countries with rules along the lines of those in section III, the contract of assignment itself did not have to be in a writing. The situation regarding notification might be different, since even under the draft Convention, notification required a writing. Under other law, a notification had not only to be made in writing, but also formally, in an authorized document. It might therefore not be appropriate simply to indicate in section IV that the time of notification could be established by any means.

2. **Mr. Huang Feng** (China) said that his delegation wished to retain the criteria governing the priority rules set out in section IV, and requested clarification as to whether or not notification of the debtor was implied.

3. **Mr. Bazinas** (Secretariat) confirmed that notification of the debtor was implied, although no reference was made to the debtor in the definition of a notification of assignment in article 5 (d). That omission might perhaps be rectified by replacing the words "is effected", in article 8 of the annex, by "is received by the debtor".

4. **Mr. Deschamps** (Canada) noted that the form of a notification was not only a matter for States that would adopt the priority regime based on notification contained in the annex, but also for those States that would not adopt the annex, but whose national law

contained a priority regime based on notification. In many instances, the notification required under national law was more formal than that provided for in the draft Convention, in which case the latter would not be sufficient to give priority to an assignee. Although the draft Convention should not seek to resolve that problem, the issue should be highlighted in the commentary in order to assist the reader.

5. **Mr. Stoufflet** (France) pointed out that the systems outlined in the annex to the draft Convention were optional. A State that had difficulty in reconciling the notification regime set out in section IV with its national notification regime could either choose not to adopt section IV and to retain its national system, or could modify its national system in the light of that section. It was a decision to be taken at the national level, not by the Commission.

6. **Mr. Bazinas** (Secretariat) said that the Secretariat would make a suggestion concerning the matter raised by the representative of Canada when the issue of form was discussed. The amendment proposed by the representative of the United Kingdom at the previous meeting, namely, to replace "is effected" in article 8 by "is received", might be expanded so as to read "is received by the debtor", in order to take account of the comment by the representative of China. For consistency, article 9 should perhaps be similarly amended.

7. **The Chairman**, noting that the concept of the amendment proposed by the United Kingdom seemed already to have been approved, requested the representative of the United Kingdom to submit her proposal to the Secretariat in writing with a view to its discussion in the drafting group.

8. *Section IV of the annex, as amended, was approved.*

9. *The annex to the draft Convention as a whole, as amended, was approved.*

Article 42 (continued)

10. **The Chairman** invited the Committee to resume its consideration of article 42, on application of the annex.

11. Noting that no speakers wished to take the floor, he said he took it that article 42, as amended by the United States delegation, could be approved.

12. *It was so agreed.*

13. *Draft article 42, as amended, was approved.*

14. **Mr. Burman** (United States of America) recalled that during the discussion of section II of the annex at the previous meeting the Secretariat had drawn attention to paragraph 26 of document A/CN.9/491, which suggested language covering the procedure for appointing the supervising authority and the registrar. He would have no objection to the incorporation of such language somewhere in the draft Convention, perhaps in the annex. In his delegation's view, reference should be made both to Contracting and to Signatory States, in order to ensure the widest possible participation of States.

15. **Mr. Sekolec** (Secretary of the Commission) said the inclusion of both Contracting and Signatory States would, in the Secretariat's view, present no technical difficulties.

16. **Ms. Sabo** (Canada) supported the suggestion made by the representative of the United States.

17. **Mr. Morán Bovio** (Spain) also supported the suggestion, adding that the precise wording and location of the provision could be decided by the drafting group.

18. **The Chairman** suggested that the drafting group should consider the matter further with a view to formulating the language of the provision and deciding on its precise location in the draft Convention.

19. *It was so decided.*

20. **The Chairman** invited the Commission to embark on a full review of the text of the draft Convention adopted by the Working Group, focusing in particular on the issues pending.

Title

21. **The Chairman** recalled that a suggestion had been made to delete the words "in International Trade" from the title.

22. **Mr. Morán Bovio** (Spain), supported by **Ms. McMillan** (United Kingdom), said that the words "in International Trade" should be retained, since

they were a traditional formula that helped the reader to understand clearly the sphere of activity concerned. Of course, the official title of the Convention would not be used on all occasions: a shortened version would be used in ordinary practice.

23. **Ms. Sabo** (Canada) expressed satisfaction with the title, but suggested inserting the definite article before the word "Assignment"; that matter might be taken up by the drafting group.

24. **The Chairman** said he would take it that the Commission wished to retain the existing title of the Convention.

25. *It was so decided.*

26. *The title was approved.*

Preamble

27. **Mr. Morán Bovio** (Spain) said that he had no objection to the preamble as currently worded. However, it would not be appropriate to include in the preamble a clause indicating that it had built on the achievements of the UNIDROIT Convention on International Factoring as proposed in document A/CN.9/490. While the two conventions were linked, the inclusion of such a clause might create difficulties for the interpretation of the draft Convention in the light of the reference to the preamble in article 7. It would be more appropriate to include a reference in the commentary to the useful preliminary work that had been carried out.

28. **The Chairman** said that, in the absence of any objection, he would take it that the preamble to the draft Convention could be approved as currently worded.

29. *It was so decided.*

Article 1

30. *Draft article 1 was approved.*

Article 2

31. *Draft article 2 was approved.*

Article 3

32. *Draft article 3 was approved.*

Article 4

33. **The Chairman** reminded the Commission that draft article 4 was to be discussed in conjunction with draft article 41.

34. **Mr. Bazinas** (Secretariat) said that article 4, on exclusions, had been adopted by the Commission the previous year with the exception of its paragraph 4, which was linked to article 41. Like that article, paragraph 4 had been placed in square brackets. However, the Working Group had identified three issues requiring further discussion. The first was whether a negotiable instrument transferred by possession but not by negotiation should also be excluded. In order to avoid interfering with the rights of persons under negotiable instrument law, paragraph 1 (b) focused not on the type of instrument, but on the negotiation. At the last session of the Working Group the question had been raised whether documents which were transferred by delivery with an endorsement and were delivered as security to a third party should also be excluded. The rationale behind that suggestion was that the person in possession of the instrument would need to be protected in the case of a priority conflict with an assignee. The normal expectation of the person in possession would be that the law of the country where the instrument was located, rather than the law of the assignor's location, would govern such a conflict of priority. Paragraph 27 of document A/CN.9/491 contained a suggestion to exclude such possession on the assumption that the exception for negotiable instruments focused on negotiation, in order to protect the expectations of the holder of an instrument. It was assumed that where there was a receivable and also a negotiable instrument incorporating the receivable, the assignment of the receivable itself would not be excluded, but that the transfer of the negotiable instrument would be excluded by virtue of article 4, paragraph 1 (b). The text of article 4, paragraph 1 (b), did not clearly reflect that intention, and new text had been suggested in paragraph 28 of document A/CN.9/491 reading as follows: "that this Convention does not affect the rights and obligations of any person under negotiable instrument law".

35. The second issue related to the definition of securities. The Commission might wish to consider whether the reference to "investment securities" in paragraph 2 (f) was sufficient to achieve the intended goal, or whether, to take account of the text on the law

applicable to dispositions of securities held with an intermediary, currently being prepared by the Hague Conference on Private International Law, that definition needed to be amended.

36. The third issue concerned the possible reformulation of article 4, paragraph 3, which had raised a number of concerns at the previous session of the Commission. In paragraph 32 of document A/CN.9/491, the Secretariat had put forward revised wording in that regard to ensure that the limitations governing the acquisition of property rights in real estate under the law of the State in which the real estate was located were not to be affected. If the concerns persisted, the Secretariat would prefer to withdraw its suggestion rather than provoke another protracted debate on the matter.

Paragraph 1 (b)

37. **Mr. Deschamps** (Canada) said that, on the issue of negotiable instruments, his delegation fully supported the new wording suggested by the Secretariat in paragraph 28 of document A/CN.9/491, which should replace the existing wording of article 4, paragraph 1 (b). A similar proposal had been made by the United States in document A/CN.9/490. He also expressed support for the suggestion made by France in document A/CN.9/490/Add.1, to replace "*effets de commerce*" with "*instruments négociables*" in the French version of the text.

38. **Ms. Piaggi de Vanossi** (Observer for Argentina), **Ms. Gavrilesco** (Romania) and **Mr. Morán Bovio** (Spain) supported the remarks of the representative of Canada concerning the Secretariat's suggested rewording of paragraph 1 (b).

39. **Mr. Ducaroir** (Observer for the European Banking Federation) said that, as he understood it, the representative of Canada had supported the new wording of paragraph 1 (b) suggested by the Secretariat, but had also supported the suggestion by France to amend two words in the French version of the existing text. It was important to be clear about what was being undertaken. At all events, great caution should be exercised in the use of terminology.

40. **Mr. Bazinas** (Secretariat) said that in view of the difficulty of arriving at a uniform definition of the term "negotiable instruments", the Commission might wish

to arrive at a general understanding of the term, which could then be further developed in the commentary.

41. **Mr. Chan** (Singapore) questioned the procedure being followed. The new wording suggested by the Secretariat referred to "negotiable instrument law". However, he doubted that such a term could safely be used when there was no agreement as to what constituted a negotiable instrument.

42. **Mr. Bazinas** (Secretariat) said that the wording suggested by the Secretariat had not created the problem; the term "negotiable instrument" already appeared in the current text of article 4, paragraph 1 (b), as approved by the Commission. The wording suggested by the Secretariat was tentative, and had merely been put forward for consideration.

43. **Mr. Zanker** (Observer for Australia) endorsed the comments made by the representative of Canada. The wording suggested by the Secretariat might perhaps be incorporated in a new paragraph 3 (c). The existing paragraph 1 (b) should then be deleted.

44. **Mr. Doyle** (Observer for Ireland) said that the language of the existing text was not particularly satisfactory and that the wording suggested by the Secretariat had initially seemed very attractive. However, he had been struck by the comments of the representative of Singapore: negotiable instrument law being a very broad and ill-defined subject, he would, on balance, prefer the text to remain as it stood.

45. **Mr. Morán Bovio** (Spain) said that the concerns expressed by the representative of Singapore and the observer for Ireland were unjustified. The wording suggested by the Secretariat, although general, clearly stated that the draft Convention would not affect the rights and obligations of any person under negotiable instrument law. However, when a transaction was not covered by negotiable instrument law, the draft Convention would be applicable. At first sight, the language suggested might appear to create difficulties. On closer examination, however, it was far preferable to the text of article 4, paragraph 1 (b), as currently worded.

46. **Mr. Bazinas** (Secretariat) said that the main issue was the two questions referred to the Commission by the Working Group: first, whether to exclude instruments transferred by possession; and second, if such instruments were not to be excluded, the need to include a different priority rule to protect the rights of

persons in possession of such instruments. The Secretariat's suggestion was one way of addressing those questions.

47. **Mr. Franken** (Germany) said that while his delegation supported the comments made by the representative of Canada, it had some difficulty with the wording suggested by the Secretariat. The term "does not affect" was ambiguous, and not used elsewhere in the article. Furthermore, as was stated in paragraph 28 of document A/CN.9/491, the wording suggested by the Secretariat would also result in avoiding excluding the assignment of a contractual receivable just because the receivable was incorporated into a negotiable instrument—something which was not the intended objective. The wording to be adopted should therefore be considered further, given that most participants would agree, as a matter of policy, that something should be done to address the questions referred to the Commission by the Working Group.

48. **The Chairman** suggested that the meeting should be suspended to allow delegations to discuss their concerns directly with the Secretariat.

The meeting was suspended at 3.40 p.m. and resumed at 4.10 p.m.

49. **Mr. Bazinas** (Secretariat) said that the wording suggested in paragraph 28 of document A/CN.9/491 was one possible solution to the question put forward by the Working Group, and was consistent with the policy of the Working Group and the Commission. The intended aim was to avoid affecting the rights and obligations of persons holding instruments under negotiable instrument law. However, where, under national law, a receivable incorporated into a negotiable instrument might be assigned separately, such assignments would not be excluded from the Convention. The draft Convention would not interfere with those systems which did not permit an assignment of the receivable in the case where it was incorporated in a negotiable instrument.

50. The term "does not affect" was used in several articles of the draft Convention to imply that the matter was not excluded but that the Convention did not affect rights conferred under law other than the Convention. Thus, the priority of a person holding an instrument would be governed by the law of the country where the instrument was located.

51. The Commission had three options if it wished to address the question referred to it by the Working Group: the text suggested by the Secretariat; the inclusion in the draft Convention of a different priority rule to deal with those transfers of negotiable instruments that would not be excluded under article 4, paragraph 1 (b); and lastly, exclusion by way of declaration under article 41. The key issue was which, if any, of those three options the Commission would prefer to adopt, rather than whether or not the wording of a particular proposal was appropriate.

52. **The Chairman** suggested that, in order to expedite matters, representatives who wished to take the floor should focus on the options available.

53. **Mr. Stoufflet** (France) recalled that in the course of a series of meetings the Working Group had taken the view that it could deal with the question of negotiable instruments by excluding completely from the Convention certain types of receivables. It had then come round to the view that that would not be a sound method, and that what was significant was rather the technique used to transmit a given receivable, namely, the various forms of negotiation. France's proposal had therefore been that whenever the parties used techniques of negotiation the Convention would not apply, because such techniques were subject to an entirely different legal regime from that set out in the Convention. As he understood it, that was exactly the spirit of the text proposed by the Secretariat in paragraph 28. His delegation was therefore prepared to accept that text, the consequence of which would be that if a receivable was incorporated in a negotiable instrument and the parties transferred that receivable using the traditional forms of assignment, there was no reason why the Convention should not apply.

54. However, he had certain reservations as to the latest proposal by the Secretariat which, if he had understood correctly, would include in the Convention priority rules that would be specifically applicable in the case of negotiable instruments. He feared that that would go beyond the Commission's mandate, and might result in conflict with existing instruments.

55. **Mr. Whiteley** (United Kingdom) joined in supporting the Secretariat's argument that the Commission should seek to exclude transfer by possession. It would be better not to omit any mention of that issue in the Convention, since the debate it had so far generated showed that the question was not

uncontroversial, and some guidance should be given as to how such transfers should be treated.

56. While agreeing with the representative of Germany that the provision should be drafted in clearer language, he nevertheless considered that the language in paragraph 28 was eminently preferable to the current wording. As to how the language might be improved, he concurred that it might be difficult to arrive at a definition of "negotiable instrument". The crucial point was that such instruments, whatever they were, could be and in fact were transferred easily on a daily basis outside the scope of the Convention, and that the Commission would not wish to take any step which might impede that practice.

57. **Mr. Smith** (United States of America) said that many members of the Commission appeared to be in favour of the proposal made by the Secretariat, but that others had concerns, relating chiefly to definitional issues. Perhaps the approach taken could be along the lines of that suggested by the Secretariat earlier, namely, to focus not on definitions, but rather on practical questions such as whether what was being transferred was in fact an instrument, whether the person concerned was in possession of that instrument, and if so what would be the legal effect of such possession under the law of the State in which the instrument was situated. Answering those questions would provide an answer as to what rights that person had, and whether the Convention would affect those rights.

58. If that approach was taken, the language used could be quite simple and still address all the concerns expressed. He suggested the formulation: "This Convention does not affect the rights of an assignee in possession of an instrument under the law of the State in which the instrument is situated".

59. **Mr. Franken** (Germany) said it was clear that a receivable originating under the original contract had to be distinguished from a receivable generated by issuing a cheque: it was the latter that the Commission sought to exclude from the scope of the Convention. He suggested that the sentence proposed should be amended to read: "This Convention is not applicable to the assignment of a receivable incorporated in a negotiable instrument" (or "...in an instrument governed by negotiable instrument law").

60. **Mr. Zanker** (Observer for Australia) said that although his preference was still for the Secretariat's suggested wording, he could accept the proposal by the representative of Germany if there was majority support for it.

61. **Mr. Whiteley** (United Kingdom) noted that the terms "assignment" and "assignee", used in the German and United States proposals respectively, were both defined in article 2 of the Convention. It would therefore be better to change the wording of that provision so as to make clear that the proposed exclusion concerned practices involving negotiation rather than assignment or assignees as defined in the Convention.

62. **Mr. Deschamps** (Canada) said that although the new United States proposal was not a bad one, his delegation was not prepared to endorse it, because it suspected that it differed in substance from the Secretariat's suggestion, for which it had expressed support. As had been explained by the representative of France, one of the reasons for providing for exclusions in the Convention was in order to exclude transfers by negotiation. If a transfer was effected by assignment under the rules of common law, without the assignee being able to claim any rights under the law governing negotiable instruments, then it would be in the same position as any other assignee. The United States proposal suggested that an assignee who was in possession of an instrument would not be subject to the Convention even if negotiable instrument law was not applicable.

63. The United States representative had rightly pointed out that a number of speakers had raised questions concerning the meaning of the term "negotiable instrument law", and it was true that problems of definition could not be entirely avoided. Similar problems had arisen with regard to the term "consumer protection law", and it had eventually been agreed to refer to that law only in general terms in order to avoid the Convention becoming unduly lengthy.

64. The problem of defining "negotiable instrument law" was probably less acute than the problem of defining "securities", which were referred to later in the text of article 4. The Working Group's conclusion had been that any attempt to define that term would create more problems than it solved. He submitted that difficulties over the meaning of negotiable instrument

law ought not to deter the Commission from adopting the proposal of the Secretariat if it considered it to be sound in substance.

65. Nor could he support the German proposal, which, under a number of legal systems, would have the effect of removing a large number of receivables from the scope of the Convention on the grounds that they were also represented by a negotiable instrument. The moment the debtor issued a cheque in settlement of an account receivable and the beneficiary deposited that cheque in his bank, the transaction would be excluded because that deposit would constitute a transfer within the meaning of the Convention.

66. **Mr. Morán Bovio** (Spain) said the German proposal posed a serious risk of excluding from the Convention any possible assignment of a receivable incorporated in a negotiable instrument. That proposal should not be pursued, since it would run counter to the approach adopted by the Working Group over the past years.

67. The United States proposal in fact barely differed from that of the Secretariat, merely substituting the word "assignee" for the words "any person". He agreed with the United Kingdom representative that it would be preferable not to make reference to the assignee in the context of exclusions. He thus continued to prefer the Secretariat's proposal, which could perhaps be modified by the addition of the phrase "under the law of the State in which the instrument is situated", taken from the United States formulation.

68. **Mr. Bazinas** (Secretariat), on a point of clarification for the purposes of the commentary, asked whether the Commission was in a position to agree that "negotiable instrument", a term not defined in the Convention, basically meant bills of exchange, promissory notes, and cheques. It bore noting that a provision making an exclusion from the Convention need not lay down a conflict-of-laws rule, but could simply refer to the law governing the instrument.

69. **Mr. Doyle** (Observer for Ireland) said he could not support the German proposal, which was the precise opposite of what the Commission was trying to achieve. He was not opposed to the United States proposal, which was basically a refinement of the Secretariat's formulation, and could accept either proposal depending on the wish of the majority.

70. **Ms. Straganz** (Austria) said that her delegation would have favoured the German proposal, but that since the latter had not commanded much support, it could endorse the Secretariat's suggested formulation, though not the proposal made by the United States.

71. **The Chairman** noted that there was general support for the Secretariat's proposal. He suggested that it should be forwarded to the drafting group, modified so as to take into account the points raised during the discussion.

72. **Ms. McMillan** (United Kingdom) said that her delegation, while supporting the Secretariat proposal, considered that as now drafted it was too wide in scope.

73. **Mr. Bazinas** (Secretariat), in reply to questions from **Mr. Stoufflet** (France) and **Ms. Gavrilesco** (Romania), said his understanding was that the drafting group would be taking as a basis for its work the text in paragraph 28 of document A/CN.9/491, perhaps replacing the term "negotiable instrument law" by "law governing the negotiable instrument". The text would reflect points raised in the course of the discussion, and might involve a restructuring of the article as a whole.

The meeting rose at 5.05 p.m.



General Assembly

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United Nations Commission on International Trade Law

Thirty-fourth session

Summary record of the 717th meeting

Held at the Vienna International Centre, Vienna, on Thursday, 28 June 2001, at 9.30 a.m.

Chairman: Mr. Pérez-Nieto Castro.....(Mexico)

Contents

Draft Convention on Assignment of Receivables in International Trade (*continued*)

Election of officers (*continued*)

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The meeting was called to order at 9.50 a.m.

Draft Convention on Assignment of Receivables in International Trade (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4 and A/CN.9/491 and Add.1)

Article 4 (continued)

Paragraph 1 (b) (continued)

1. **Mr. Smith** (United States of America) said that, while his delegation had no objection to the proposal put forward at the previous meeting concerning negotiable instruments, there were three areas that that proposal did not cover. The first area concerned situations in which a negotiable instrument was delivered in pledge to a lender. Such a situation might arise not through negotiation but through the mere physical delivery of the instrument under the law of pledge. Under the draft Convention, the priority of the pledge would be governed by the law of the assignor's jurisdiction, whereas the lender might naturally assume that, owing to its physical possession of the instrument, it had priority.

2. The second area of concern dealt with instruments that might not be technically negotiable instruments but which were treated under applicable law much like negotiable instruments. Such instruments normally represented a right to payment, and that right to payment was normally transferred through the physical delivery of the instrument, often with an endorsement or assignment. Once again, the transferee might have every reason to believe that, by taking physical possession of an instrument with an endorsement or assignment, it had priority and would normally not be aware that priority would be governed by the law of the assignor's jurisdiction.

3. The third area concerned electronic instruments. Many countries were developing laws where instruments could be evidenced in electronic form and where the electronic instrument was treated under the law as if it was a negotiable instrument. However, since the electronic instrument was not evidenced by a writing, it did not technically qualify as a negotiable instrument.

4. Although some delegations might object that his delegation was introducing new issues that should not be raised, the three areas of concern were merely amplifications of the policy underlying the discussion of negotiable instruments that had taken place at the previous meeting. A discussion of those issues in the context of article 4 would facilitate the Commission's consideration of article 41.

5. **Mr. Morán Bovio** (Spain) said that the representative of the United States should explain why the Secretariat's proposal on article 4, paragraph 1 (b), contained in paragraph 28 of document A/CN.9/491, did not resolve the three areas of concern that he had raised, as well as how the United States proposal resolved those issues.

6. **Mr. Smith** (United States of America) said that the Secretariat's proposal did not address all of the issues that he had raised. First, under the law of pledge, if an instrument was merely pledged but not negotiated, the lender might believe that it had priority, not realizing that its rights would still be affected by the Convention since no negotiation had taken place. Secondly, if an instrument was not a negotiable instrument, the rights of the holder of the instrument would be affected by the Convention. The Secretariat's proposal dealt only with negotiable instruments. There were several types of instruments that were not negotiable and which were normally pledged or transferred with endorsement or assignment. Electronic instruments were often not covered because in many countries the negotiable instrument law required that a negotiable instrument should be evidenced by a writing. In the negotiable instrument law of such countries, "writing" meant a physical writing, whereas that term was construed much more broadly in the draft Convention and could include electronic records.

7. **Mr. Deschamps** (Canada) said that, while a significant number of delegations had been in favour of the Secretariat's proposal, some delegations had expressed concern about the meaning of the term "negotiable instrument law". The United States delegation had attempted to solve that problem by proposing another text that was also intended to solve other issues. His delegation believed that the United States proposal would give rise to problems of

interpretation, in so far as the term "negotiable instrument" was viewed by some delegations as being not entirely clear. The use of the term "instrument" instead of "negotiable instrument" would require a definition of "instrument", and he wondered whether the Commission would be able to reach consensus in that regard. In a situation where someone wished to take as a pledge an instrument that was not a negotiable instrument and which nevertheless was capable of being pledged, his delegation would prefer the pledgee to have to comply with the Convention, as the lesser of two evils. It was extremely difficult to distinguish between a mere piece of paper and an instrument. For that reason, Canada supported the Secretariat's proposal.

8. **Mr. Stoufflet** (France) said that, at the previous meeting, the United States delegation had proposed that a list should be made of situations involving negotiable instruments. That approach was not entirely acceptable because lists were never complete and it was not always easy to interpret descriptions of specific practices. Perhaps the Secretariat's proposal could include wording to the effect that the same solution would apply to all transfers of instruments made in the same manner—namely by endorsement or delivery—as the negotiation. If an instrument was not negotiable by nature but was transferred in the same manner, the principle set forth in the Secretariat's proposal should apply. He wondered whether that formulation would be acceptable to the United States delegation.

9. **Mr. Morán Bovio** (Spain) said that the Secretariat's proposal was to be supplemented by an explanation in the commentary to the effect that "negotiable instrument legislation" would refer to cheques, promissory notes and bills of exchange as the main criteria. Thus, the draft Convention would exclude three instruments that had their own clear, applicable law. The United States proposal did not deal with cheques, promissory notes or bills of exchange but rather with any type of receivable that was covered by a writing. His delegation wished to know what type of assignment would remain under the Convention if the United States proposal was accepted.

10. **Mr. Doyle** (Observer for Ireland) said that, if a decision was to be taken, his delegation would favour adopting the Secretariat's proposal, since there seemed to be no better solution.

11. **Mr. Smith** (United States of America) said that his delegation could go along with the proposal made by the representative of France. That proposal would modestly expand the Secretariat's proposed language to include the delivery of instruments which, under applicable law, were transferred in much the same way as negotiable instruments.

12. **Mr. Whiteley** (United Kingdom) said that his delegation supported the solution proposed by the representative of France.

13. **Mr. Chan** (Singapore) expressed concern that the discussion was creating more difficulties than it was resolving. The longer a text was examined, the more problems would be identified, some of which were more real than others. While appreciating the concerns of the United States delegation, he did not understand why it had raised them at such a late stage. Even its written comments had failed to mention the fundamental point now raised. The United States representative argued that the inclusion of his concerns in the earlier subparagraphs of article 4 would help to determine the scope of article 4, paragraph 4, and article 41, which dealt with the exclusion of practices from the Convention. However, since there was no end to the number of current or as yet unknown practices that could be excluded, a more useful approach would be to determine the limits of exclusions, and to allow States to make the relevant declarations to exclude established practices that did not accord with the scope of the Convention. If the United States proposal to include additional exclusions in article 4, paragraph 4, was adopted, should any additional practices be identified at any subsequent time before the Convention entered into force, some States might refuse to become signatories, on the grounds that those practices were not excluded. It would thus be unwise to attempt to come up with a comprehensive list of excluded practices. Article 4, paragraph 4, and article 41 should be formulated first, with a view to determining what kind of exclusions could be made, and no further language should be added to the other subparagraphs in article 4. However, if that approach was not acceptable to the Commission, in its capacity as the Committee of the Whole, the proposal made by the representative of France would be an acceptable alternative.

14. **Mr. Deschamps** (Canada) said that, while he appreciated the United States concern and was

sympathetic to the proposal by France, the Commission was venturing into uncharted territory. If the exclusions were extended to apply not only to negotiable instruments, but also to any instrument transferable by delivery in the ordinary course of business, the applicable law would have to be determined, and the term "instrument" defined. For instance, an instrument called a chattel paper existed in the United States and Canada, which could be pledged and was unknown as a concept in most other legal systems. Would such a document be covered by the term "instrument"? If the Commission agreed that the solution proposed in the Convention—namely, that the law of the assignor's location should determine issues of priority—was appropriate, then the same solution could apply to so-called "instruments" which were not in fact negotiable instruments.

15. **Mr. Morán Bovio** (Spain) said that the representative of Canada had pinpointed the problem posed by the otherwise attractive proposal by France.

16. **Mr. Doyle** (Observer for Ireland) agreed with the representative of Singapore that the longer the discussion went on, the more difficulties would be encountered. Instead, the Commission should be looking to resolve problems by consensus. He would be happy to support the proposal by France if that would lead to a generally acceptable agreement.

17. **Mr. Whiteley** (United Kingdom) said that, as he understood it, France's proposal was not as wide in scope as the representative of Canada had suggested. The wording suggested by the Secretariat would be the basis for the proposal. Consequently, it would allow the Convention to apply, without displacing rules that would otherwise apply to determine priority. An instrument known as a bill of sale existed in the United Kingdom, for which a registration regime was in place. If France's proposal was adopted, that regime would continue to apply, while bills of sale assigned under the Convention would be covered by the Convention.

18. **Mr. Stoufflet** (France) said that his proposal had been an improvised solution, made with a view to building a consensus which responded to the concerns of the United States delegation. As the representative of the United Kingdom had indicated, it was not very ambitious in scope. It was simply a way of taking into account the fact that in some countries there were some types of receivables which were not negotiable instruments, but which served as such for some

purposes. All he proposed was that, under the Convention, those types of receivables should be dealt with as if they were negotiable instruments.

19. **Mr. Deschamps** (Canada) said that, while his delegation would not oppose any text that enjoyed a broad consensus, it needed to see a written version of the text proposed by the French delegation. A number of difficulties of interpretation would be created by replacing the words "negotiable instrument" with "instrument". He failed to understand how that could be reconciled with the text proposed by the Secretariat in paragraph 28 of document A/CN.9/491, namely, "This Convention does not affect the rights and obligations of any person under negotiable instrument law". Although the wording could be amended to read "the rights and obligations of the holder of a negotiable instrument or any similar instrument", the problem remained how to amend the words "under negotiable instrument law". Under what law could those similar instruments be considered? Careful thought needed to be given to the legal implications of the French proposal before any decision was taken.

20. **The Chairman** suggested that the delegations of France, Canada, Spain, the United States of America, the United Kingdom and any other interested delegations should meet with the Secretariat in the interval before the afternoon meeting, with a view to developing an acceptable text capturing the notion of instruments transferred in a similar way to negotiable instruments. The resulting text would be referred to the Commission the following day.

21. *It was so agreed.*

22. **Ms. Sabo** (Canada) said that her delegation reserved the right to comment further on the drafting once a new formulation had been agreed, since it raised a policy issue.

Paragraph 2

23. **Mr. Smith** (United States of America) said that at a previous meeting the Secretariat had pointed out that the Hague Conference text on the law applicable to dispositions of securities held with an intermediary favoured a choice-of-law rule based on the place of the relevant intermediary approach (PRIMA), whereas the draft Convention gave priority to the location of the assignor. That situation might result in an overlap between the proposed Hague instrument and the draft

Convention. He asked whether that issue had been addressed.

24. **Mr. Bazinas** (Secretariat) said that the previous day a proposal had been received from the Hague Conference on how to avoid an overlap between its proposed text and the draft Convention. There appeared to be an emerging consensus in the securities industry in favour of PRIMA. The suggestion of the Hague Conference experts was that article 4, paragraph 2 (d), of the draft Convention should refer to "all securities held with an intermediary" rather than to "securities settlement systems", on the grounds that the reference to settlement systems would not be sufficient to exclude all indirectly held securities covered by the Hague Conference text.

25. **Mr. Markus** (Observer for Switzerland) supported the Hague Conference experts' proposal. Another solution would be to address the problem in paragraph 2 (f), but either approach would be acceptable. With regard to paragraph 2 (d), he asked whether the proposed formula would retain the adjective "investment", which, in his view, was redundant.

26. **Mr. Whiteley** (United Kingdom) said he fully agreed that there should be no overlap between the Convention and the Hague Conference text. As he saw it, paragraph 2 (d) referred to settlements of transactions that had taken place: inter-bank payment systems were used to transfer money once a transaction had been agreed and investment securities settlement systems were used to transfer securities. The securities excluded from the Convention under paragraph 2 (d) were therefore "in-flight" securities that were being transferred from a seller to a purchaser. Paragraph 2 (f) seemed to be the securities equivalent of paragraph 2 (c) inasmuch as it referred to the holding of securities. The reference in the chapeau to receivables "arising under or from" the holding of securities might be another way of saying "arising directly or indirectly from" securities held by an intermediary. The drafting group might wish to consider moving the relevant subparagraphs closer together to establish a clearer link between them.

27. **Mr. Smith** (United States of America), endorsing the points made by the representative of the United Kingdom, said that the drafting group should review the wording not only of paragraph 2 (f) but also of paragraph 2 (d). The term "investment securities"

might not fully cover the types of financial assets that were subject to a settlement system and to which paragraph 2 (d) would be applicable. Clearance systems might exist for other kinds of financial assets that would normally also be held by intermediaries. With regard to paragraph 2 (f), the Commission seemed to intend that it should apply not only to the sale, loan or holding of, or agreement to repurchase, investment securities but also to a transfer of security rights in the securities or other financial assets credited to a securities account.

28. **Mr. Bazinas** (Secretariat) said that the drafting group would appreciate some guidance as to the type of amendment that the representative of the United States wished to make to paragraph 2 (d). He took it that paragraph 2 (f) should refer to all indirectly held securities and to security rights in such securities.

29. **Mr. Smith** (United States of America) proposed inserting a reference in paragraph 2 (d) to settlement systems relating to investment securities or other financial instruments or assets. The idea was that the exclusionary provision in paragraph 2 (d) should be applicable in cases where a financial instrument or asset was normally held in a securities account and a clearance or settlement system existed for that type of asset.

30. The categories of transaction to which paragraph 2 (f) was applicable should include a transfer of security rights in investment securities and a transfer of security rights in any type of financial instrument or asset that was to be credited to or held in a securities account.

31. **Mr. Markus** (Observer for Switzerland) suggested that the concern of the United States representative to cover all kinds of transactions in paragraph 2 (f) might be addressed by replacing the existing enumeration by the words "all transactions relating to investment securities".

32. **Mr. Ducaroir** (Observer for the European Banking Federation) said he preferred the term "investment securities" to "securities", as being more restrictive.

33. He pointed out that certain negotiable instruments were not payment instruments but financial assets: for example, assets called "commercial paper" in the United States of America were viewed as securities. Yet equivalent instruments in countries such as France,

e.g. *certificats de dépôt* or *billets de trésorerie*, were not regarded as financial assets. He thus wondered whether they were covered by the exclusionary provisions. If not, a decision should be taken regarding the gap in coverage affecting countries that did not classify commercial paper as securities. The matter should at least be clarified in the commentary to the article.

34. **Mr. Deschamps** (Canada) proposed using the wording of the Hague Conference text, article 3 of which provided that "dealings in securities credited to a securities account are governed by the law of the place of the relevant securities intermediary". The expression "dealings in securities" was used throughout the text. He proposed that article 4, paragraph 2 (f), of the draft Convention should be amended to read "Dealings in securities held with an intermediary".

35. The proposal by the representative of the United States to expand the exclusionary provisions to apply to financial assets that were not securities and to security rights in securities needed further exploration. It would be difficult to incorporate the latter addition under the chapeau of paragraph 2 and in his proposed new version of paragraph 2 (f). Perhaps security rights in securities were already implicitly covered by the term "dealings". He also drew attention to a possible narrowing of the exclusionary provision in paragraph 2 (f). As it stood, it would probably cover both directly and indirectly held securities. But the new version would be applicable only to securities held with an intermediary. He wondered whether the Commission wished to restrict the exclusionary provision to indirectly held securities.

36. **Ms. Summe** (Observer for the International Swaps and Derivatives Association Inc.—ISDA) said that ISDA was a global trade organization with over 530 members operating in 42 countries, who engaged in privately negotiated swaps and derivatives transactions. Her organization supported the place of the relevant intermediary approach (PRIMA) adopted in the Hague Conference text and was in favour of using the wording of that text, as suggested by the representative of Canada.

37. The inclusion of foreign exchange contracts, representing over a trillion United States dollars a day in value, in article 4, paragraph 2, would create great uncertainty and distort market practices in the

42 jurisdictions in which ISDA members operated. Moreover, the existing body of law on the subject might be difficult to harmonize with the Convention. She therefore suggested that foreign exchange contracts be excluded from the Convention.

The meeting was suspended at 11.20 a.m. and resumed at 11.55 a.m.

38. **Mr. Bazinas** (Secretariat) requested confirmation for the drafting group that the Commission wished to amend paragraph 2 (f) to include a reference to transfers of security rights and to expand the reference to securities by inserting a phrase such as "or other financial assets or instruments held with an intermediary".

39. With regard to paragraph 2 (d), he requested further guidance for the drafting group as to how it should be amended.

40. **Mr. Smith** (United States of America) reiterated that paragraph 2 (d) currently covered settlement systems that related only to what were called investment securities, a term not defined in the Convention. His understanding was that the receivables arising from clearance or settlement systems for financial assets that were normally transferred among financial intermediaries should also be excluded from the Convention. He was therefore concerned at the limitation of the exclusionary provision to settlement systems involving investment securities. It should also cover settlement systems involving financial assets and financial instruments that were generally held in a securities account. As some countries might not be familiar with the term "settlement systems", he proposed amending the text to read "clearance and settlement systems" to make it clear that the system was entitled to settle not only payments but also deliveries or other transfers of title to parties in the system.

41. **Mr. Bazinas** (Secretariat) said, with regard to the proposal by the observer for ISDA, that when the Convention had been drafted foreign exchange transactions had been assumed to be excluded under either paragraph 2 (a) or 2 (b). In response to concern within the financing industry over transactions that occurred outside a regulated exchange and were not covered by a netting agreement, the Commission might however wish to add a specific reference to foreign

exchange transactions in an additional subparagraph of paragraph 2.

42. **Mr. Franken** (Germany) expressed support for the proposal by ISDA, as outlined by the Secretariat.

43. **Mr. Ducaroir** (Observer for the European Banking Federation), after also supporting the ISDA proposal, suggested reversing the order of subparagraphs (e) and (f): whereas all the other subparagraphs were homogeneous and even overlapping, and therefore belonged together, subparagraph (e) related to a completely separate issue.

44. **Mr. Smith** (United States of America) supported the ISDA proposal, and also the drafting proposal made by the observer for the European Banking Federation.

45. *Paragraph 2 was approved.*

Paragraph 3

46. **Mr. Winship** (United States of America) said that at the thirty-third session of the Commission a decision had been taken, after considerable debate, to include within the scope of the draft Convention receivables in the form of rental payments arising from real property, in recognition of the difficulty experienced in some jurisdictions such as his own, where a variety of laws obtained with regard to what was considered a receivable. Rental payments were considered personal property in some states of the United States but real property in others. Practitioners in real property finance in the United States had since pointed out that the hurriedly drafted provision contained in paragraph 3 (a) could cause problems with regard to not only rental payments but also hotel room rentals or even seats in a football stadium. Would they be regarded as real or personal property under the draft Convention? In order to avoid the need for the United States and other countries with a similar problem to issue a declaration under article 4, paragraph 4, or article 41, existing paragraph 3 (a) could be replaced by a provision along the following lines: ["This Convention does not] (a) Apply to the assignment of a receivable related to land situated in a State in which a property right in land confers a right to such a receivable." Alternatively, a new subparagraph could be added, stating that a State could declare otherwise; and such a declaration could be accompanied by greater detail.

47. **Ms. Gavrilesco** (Romania) said that, in the interests of making the Convention as flexible and durable as possible, her delegation could accept the replacement of existing paragraph 3 (a) by the text proposed by the United States. In that case, the word "or", which appeared between subparagraphs (a) and (b) in document A/CN.9/486, annex I, but not in A/CN.9/489, paragraph 41, should be deleted. Subparagraph (b) should be retained.

48. **Mr. Stoufflet** (France) said he had no objection to the United States proposal. However, he requested confirmation, for the purposes of translation into French, that the word "land" included the constructions on such land.

49. **Mr. Winship** (United States of America) confirmed that "land" included the constructions on the land. He added that other jurisdictions with similar problems had objected to the terms "real estate" and "immovable". The term "real property" might be preferable.

50. **Mr. Whiteley** (United Kingdom) said that, if the United States proposal involved the total exclusion of receivables arising from land, it constituted a substantive difference from the current provisions of the draft Convention, which stated that the priority rules of the Convention would not apply where they would conflict with the priority rules relating to the land in question. Under English law, "land" included the constructions on that land, if they were permanent. Whichever term was ultimately chosen, the terminology in subparagraph (b) should be aligned with that in subparagraph (a), in order to avoid giving the impression that two different issues were involved.

51. **Mr. Doyle** (Observer for Ireland) said that, unlike the United Kingdom representative, he had always understood the provision to concern an exclusionary rather than a priority rule. The debate on the topic had been rather whether it should concern total or partial exclusion or the total inclusion of real property. Given that his delegation had always supported the widest possible exclusion, he was in favour of the United States proposal. He also found the term "land" acceptable: in Ireland, "land" included everything on that land.

52. **Mr. Morán Bovio** (Spain) expressed a preference for the existing text. He endorsed the view of the United Kingdom representative that the United States

proposal involved a broad exclusion. Its adoption would mean that, for example, building companies would not be able to assign rights in receivables against people who had rented offices. The draft Convention as it stood covered that situation. At first sight, without benefit of a text in Spanish, the United States proposal seemed unduly broad.

53. **Mr. Deschamps** (Canada) said that the problem of whether receivables which were rental payments should be excluded was a problem that arose in most countries, because under civil-law systems the principle was that property conferred the right to the proceeds of that property, including rent. His delegation believed that rents for real estate should therefore be excluded.

54. **Mr. Zanker** (Observer for Australia) associated his delegation with the view expressed by the observer for Ireland. In Australia, too, "land" included the land itself and everything built on it. He suggested that, for jurisdictions for which the provision caused difficulty, the phrase "property rights in real estate" could be replaced by the phrase "interest in real property".

55. **Mr. Kobori** (Japan) requested a clarification of the meaning of paragraph 3 (b) in view of the commentary contained in paragraph 56 of document A/CN.9/489. He would prefer to strengthen the term "make lawful" by replacing it with "give legal effect to" or "make legally effective".

Election of officers (*continued*)

56. **Ms. Ochieng** (Kenya), speaking on behalf of the African Group, nominated Mr. Enouga (Cameroon) for one of the posts of Vice-Chairman.

57. **Mr. Joko Smart** (Sierra Leone) seconded the nomination.

58. *Mr. Enouga (Cameroon) was elected Vice-Chairman by acclamation.*

The meeting rose at 12.35 p.m.



General Assembly

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United Nations Commission on International Trade Law

Thirty-fourth session

Summary record of the 718th meeting

Held at the Vienna International Centre, Vienna, on Thursday, 28 June 2001, at 2 p.m.

Chairman: Mr. Pérez-Nieto Castro(Mexico)

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Draft Convention on Assignment of Receivables in International Trade (*continued*)

Election of officers (*continued*)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum.

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The meeting was called to order at 2.15 p.m.

Draft Convention on Assignment of Receivables in International Trade (continued) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-5 and A/CN.9/491 and Add.1)

Article 4 (continued)

Paragraph 3 (continued)

1. **Ms. Gavrilesco** (Romania) said that her delegation could support the reformulated text of paragraph 3 (a) proposed by the United States representative at the previous meeting. It was important to specify that the word "land" appearing in the proposed text included both the land and the constructions on it.

2. **Ms. McMillan** (United Kingdom) said that her delegation was not clear as to what policy had been adopted at the previous session. According to the Irish and Australian observer delegations, it had been decided that all receivables arising from transactions in land were to be excluded from the scope of the draft Convention. As the United Kingdom delegation understood it, however, the Commission had agreed to try to provide for the exclusion of assignments that could enable a non-national to purchase land and buildings in a State where that was prohibited by national land law; for an exclusion based on what the United States representative had described at the previous meeting; and for an exclusion aimed at preserving the priority secured for lenders by registration when lending against the security of land. If that narrower policy was in fact the one decided upon, her delegation could propose text in an attempt to meet the purpose.

3. Whatever form the exclusions ultimately took, her delegation would not be happy with the term "real estate", which could be taken to refer to buildings and to exclude the land on which they stood, and which was an expression not used in United Kingdom land law. It had no objection to "land" being defined so as to include buildings, in line with the definition of land in European Union legislation.

4. **Mr. Chan** (Singapore) endorsed the views expressed by the United Kingdom representative. The United States proposal differed fundamentally from the policy decision reached following considerable discussion in the Commission on how receivables arising from real estate transactions should be dealt with in the

draft Convention. That decision had been a compromise between several competing interests. In his view, the issue was too complex to revisit at the present stage, and the carefully thought-out text now before the Commission was probably the best that could be achieved.

5. **Mr. Doyle** (Observer for Ireland) said he agreed with much of what the two previous speakers had said. He noted the suggestion by the Secretariat, in paragraph 32 of document A/CN.9/491, that the issue might have to be looked at again. However, if there was consensus on the current text, he would be happy to leave it as it stood.

6. **Mr. Winship** (United States of America) said that his delegation had not intended to reverse any policy. Its proposal had been made with the aim of ensuring that major national real estate markets were not disrupted, since United States property law differed from state to state and there would be a problem in having a generally applicable rule. His delegation would be prepared to withdraw its proposal on the understanding that the draft Convention provided for declarations to be made by States that so wished. That would require some adjustment to the language of article 4, paragraph 4, and of article 41, with the inclusion of a reference to the location of the land or the real estate. He wished to stress that his delegation was not seeking a very broad authority, but was willing to narrow the scope of the possible declarations.

7. **Mr. Morán Bovio** (Spain) thanked the United States delegation for withdrawing its proposal. Careful thought should be given to the revised wording to be proposed for article 4, paragraph 4, and article 41.

8. **Ms. McMillan** (United Kingdom) said that, in its current formulation, paragraph 3 (a) created the false impression that it was a substantive provision of land law and that the draft Convention was attempting to override national land law. Her delegation wished to propose replacing subparagraphs (a) and (b) of paragraph 3 with the words: "Where the assignment of a receivable operates so as to confer an interest in land on an assignee, nothing in this Convention shall displace or override the application to that interest of the national law of the State in which the land is located." That text attempted to convey the idea that the Convention did not override land law, any more than it overrode preferential rights in insolvency. If the text

was unacceptable or its discussion might delay the Commission's deliberations, she would simply request that the expression "property rights in real estate" be avoided. "Interest in land" would be preferable.

9. **Mr. Zanker** (Observer for Australia) said that the United Kingdom proposal was more felicitous than the current text of paragraph 3 (a). He wondered, however, whether the phrase "interest in real property", which he had already proposed, might also be acceptable from the standpoint of United Kingdom law.

10. **Mr. Winship** (United States of America) said his delegation did not believe that the language proposed by the United Kingdom delegation satisfactorily dealt with the problem addressed by paragraph 3 (a). It wished to suggest that the text should remain unchanged and that a declaration procedure should be used if any clarification was required for a particular jurisdiction, given the sacrosanct nature of real property law. That might be the most appropriate way of accommodating the needs of national markets and their internationalization. The question of deciding on a suitable phrase to convey real estate interests should be left to the drafting group.

11. **The Chairman** recalled that there had been a proposal by the delegation of Japan to amend the words "make lawful", in subparagraph (b), to read "give legal effect to".

12. **Ms. Gavrilescu** (Romania) questioned the need for further debate on paragraph 3: most delegations favoured retaining the text of subparagraph (a); subparagraph (b) had given rise to no objections; and the United Kingdom proposal could be understood as involving a change of wording but not of policy.

13. **Mr. Bazinas** (Secretariat) said that, while subparagraph (a) dealt with the conflict of priority between an assignee under the Convention and a person with property rights in land who had a right in the receivable, subparagraph (b) was intended to address a situation where an assigned receivable was secured by a mortgage, which, under article 12, conferred a right in land; and to ensure that, if the law did not allow the acquisition of that right, the Convention would not permit it. The United Kingdom proposal, which would replace both subparagraphs (a) and (b), attempted to reflect the same meaning in a more general way.

14. **Mr. Stoufflet** (France) said his delegation felt that the formulation proposed by the United Kingdom delegation was clearer and more direct. The word "land" in the English version was acceptable, since it covered both the land and the constructions on it. An equivalent term in French could no doubt be found.

15. **Ms. McMillan** (United Kingdom) said that if the proposed text presented problems, her delegation would be happy to withdraw the proposal, to retain subparagraph (b) with the reference to real estate re-drafted, and to rework subparagraph (a).

16. **Mr. Winship** (United States of America) said his delegation wished to suggest that subparagraph (b) should be retained and that the United Kingdom delegation should consult with other delegations with a view to reformulating subparagraph (a).

17. **Mr. Joko Smart** (Sierra Leone) said he could wholeheartedly support the United Kingdom proposal, which, in his view, covered both subparagraph (a) and subparagraph (b). Perhaps the word "realty" might be used in place of "land".

18. **Mr. Doyle** (Observer for Ireland) said that, while he welcomed the United Kingdom proposal, he feared that it could lead to a lengthy discussion on whether its wording actually carried the same meaning as current subparagraphs 3 (a) and (b). He was in favour of leaving the two subparagraphs as they stood, subject to rewording of the term "real estate" by the drafting group.

19. **Ms. Straganz** (Austria) said that her delegation supported the United Kingdom proposal, which was more readily comprehensible than the existing formulation and which appeared to cover both subparagraph (a) and subparagraph (b).

20. **Ms. Walsh** (Canada) said that her delegation shared the reservations expressed by the observer for Ireland. The United Kingdom proposal addressed a situation where the assignment of a receivable operated to confer an interest in land, while both the original text and the text proposed by the United States addressed the converse situation, where a property right to land conferred a right to a receivable. Furthermore, it was not clear what law was applicable for determining whether the assignment of a receivable operated to confer an interest in land. Her delegation preferred to adopt the United States proposal, subject

to clarification by the drafting group of the reference to real estate.

21. **The Chairman** said it was clear that the United Kingdom proposal to merge the two subparagraphs of paragraph 3 into a new paragraph did not command sufficient support.

Article 4, paragraph 4, and article 41

22. **Ms. Piaggi de Vanossi** (Observer for Argentina) said that, in its present formulation, paragraph 4 created a possible conflict with the draft Convention on International Interests in Mobile Equipment and its protocols, prepared by the International Civil Aviation Organization in cooperation with the International Institute for the Unification of Private Law (UNIDROIT). Since the diplomatic conference at which the UNIDROIT draft Convention and protocols were to be adopted was now due to take place at the end of October 2001, a decision should be taken by the Commission beforehand concerning the relationship between the draft Convention and the UNIDROIT draft Convention and its protocols.

23. **The Chairman** said that, since the Secretary General of UNIDROIT would be present the following day, it would be advisable to postpone the discussion of the issue raised by the observer for Argentina until a subsequent meeting.

24. **Mr. Winship** (United States of America) said that his delegation believed that article 41 must be retained. It provided the necessary flexibility, given that not all future financing practices could be anticipated. His delegation was, however, willing to accept some limitation on the right to make declarations linked to the policies represented by the exclusions in article 4. In particular, the areas covered by paragraphs 3 (a), 2 (d) and 2 (f) were ones where there was the likelihood of a need to clarify the scope of the Convention. He also wished to draw attention to his Government's comments in document A/CN.9/490 and specifically to the need for article 4 to exclude some existing practices and to specify when an assignor or a debtor must be located in a contracting State.

25. **Ms. Sabo** (Canada), after endorsing the remarks on draft article 41 made by the representative of Austria at the 715th meeting, said her delegation felt that article 4, paragraph 4, and article 41 could thwart any attempts at harmonization and should be deleted.

The argument that those provisions would give the Convention some flexibility to deal with future developments in the area of assignments was far outweighed by the detrimental effect of allowing contracting States such broad scope unilaterally and unpredictably to reduce the application of the Convention. However, her delegation might be willing to agree to the retention of those provisions if the permitted declarations could be strictly limited in scope, clearly described and confined to specific areas only.

26. **Mr. Berner** (Observer for the Association of the Bar of the City of New York) said that, in his view, the deletion of article 41 would effectively render the Convention a dead letter. The financial markets were a dynamic, worldwide industry whose innovations could not be predicted. It was important for States to have the flexibility that would allow their lenders and borrowers to develop relationships that could not be conceived of at the present time. Any changes that might be made to article 4, paragraph 4, and article 41 should allow for the broadest possible scope. The aims of keeping interest rates low and increasing the amount of credit in the world could best be achieved by means of innovations for which it was not currently possible to legislate.

27. **Mr. Whiteley** (United Kingdom) said that his delegation had always opposed the idea embodied in article 4, paragraph 4, and in article 41, and therefore wished to align itself with the delegations of Austria and Canada. If paragraph 4 was adopted, perhaps it should be amended so that its provisions also covered a State in which land was situated.

28. **Ms. Piaggi de Vanossi** (Observer for Argentina) said that her delegation wished to propose the deletion of paragraph 4 and the inclusion of language on the lines suggested by UNIDROIT, as set out on the last page of document A/CN.9/490.

29. **Mr. Stoufflet** (France) said that, while his delegation was swayed by the United States proposal to limit the possibility of exclusion to cases specifically listed in the draft Convention, the French Government would endeavour to avoid making use of that option, because of its adverse effect on unification. However, if the text did not provide for consumer protection to be guaranteed in all cases, his delegation might insist on the possibility of excluding the application of the Convention to the assignment of consumer receivables.

When the Commission came to consider draft article 17, his delegation would propose additional language in that regard.

30. **Mr. Doyle** (Observer for Ireland) said that article 4, paragraph 4, and especially article 41 had the capacity to unravel the Convention. His preference thus was for their deletion. If they were to be retained, he would be in favour of limiting those provisions in some way.

31. **Mr. Huang Feng** (China) said that draft article 41 should be retained, as new forms of assignment of receivables were bound to develop. Article 47 allowed for the possibility of amendment if one third of the Contracting States so requested. Since the Convention would enter into force after five ratifications had been deposited, in practical terms that meant that the Convention could be amended at the initiative of just two States. It was therefore very important to retain article 41.

32. **Ms. Walsh** (Canada) asked for clarification of the United States proposal to limit the scope of the declarations possible under article 4, paragraph 4, and under article 41. Was it proposed to cover situations analogous to those addressed in paragraphs 2 (d) and (f) and 3 (a) of article 4? Would the new wording allow for the exclusion of existing categories of receivables, or would it be restricted to future products?

33. **Mr. Winship** (United States of America) said that the proposal was merely a suggestion for a compromise between those who felt strongly that there was a need for uniformity and harmonization and those who feared that the Convention would not be acceptable unless it was flexible. His delegation was not yet able to propose specific language for article 4, paragraph 4, and article 41, but would be pleased to consult with others to that end.

34. **Mr. Zanker** (Observer for Australia) said he was inclined to support the deletion of article 4, paragraph 4, and of article 41. He was, however, prepared to listen to any proposals to restrict their scope, although it was not very clear how that could be done.

35. **Mr. Mecna** (India) said that article 4, paragraph 4, reflected a flexible approach which would make the Convention more acceptable, and that his delegation was therefore in favour of its retention, particularly as it would be very difficult to draw up an

exhaustive list of assignments that could be subject to declaration by States.

36. **Mr. Medin** (Sweden) said that his delegation would prefer to see article 4, paragraph 4, and article 41 deleted. However, many delegations clearly felt that article 41 must be retained so as to allow for some flexibility. It was possible, however, that, as currently drafted, article 41 went too far in that direction.

37. **Mr. Al-Nasser** (Observer for Saudi Arabia) said that his delegation supported the deletion of paragraph 4 and the retention of article 41. New products might be developed, and the possibility of issuing a declaration under article 41 would provide the instrument with the flexibility it would require.

38. **Mr. Charassangsomboon** (Thailand) supported the retention of article 4, paragraph 4, and article 41, and expressed concern about the vulnerability of small countries with open economies to speculative transactions. In any event, many countries would be reluctant to make a declaration, and would do so only as a last resort.

The meeting was suspended at 3.45 p.m. and resumed at 4.10 p.m.

39. **Ms. Ladová** (Observer for the Czech Republic) said that her delegation supported the retention of article 4, paragraph 4, as it provided for flexibility in response to unforeseeable future developments and provided better protection for consumers.

40. **Mr. Markus** (Observer for Switzerland) said that he supported the deletion of article 4, paragraph 4, and of article 41. However, his delegation could also accept a compromise, provided a clear and limited list of possible exclusions could be drawn up. To fail to do so would be to embark on a dangerous path, for any declaration made by a State under article 41 as currently worded would trigger reciprocity mechanisms under the Vienna Convention on the Law of Treaties, thereby rendering the system still more complicated. As he understood it, the United States proposal would relate only to the assignment of certain categories of receivables, and not to certain types of assignments, as currently provided for in article 41. The examples cited by the representative of Austria, to which the representative of Canada had alluded, had demonstrated that such exclusions would lead nowhere.

41. **Mr. Franken** (Germany) said that his delegation supported in principle the proposal put forward by the delegation of the United States, although more detailed analysis was required to define precisely what items should be included in article 4, paragraph 4.
42. **Mr. Smith** (United States of America) said that his delegation now had a specific proposal for draft article 41. The proposal was to address two categories of assignments of receivables. The first related to existing practices, the second to practices that might arise in the future, but that the Commission could not yet exclude because it had no way of knowing what form they would take.
43. Included in the first category were, first, assignments of receivables from the use or occupancy of land or buildings. While for many delegations such assignments raised no particular problems, they were problematic for the United States. If article 4, paragraph 3 (a), was retained in its present wording, the United States would have to consider the assignment of real estate rents for exclusion by declaration under article 41. A second area, that of negotiable instruments, was still under negotiation. If no consensus was reached, the United States would have to consider also placing assignments of receivables evidenced by a writing that was transferred by delivery, book entry or control of electronic records on that list.
44. With regard to future practices which could not be foreseen, the Convention should exclude, first, assignments of receivables arising in transactions in securities or capital markets, so as to deal with the types of exclusions already covered in article 4, paragraph 2, but in a more general way. That exclusion should have no impact upon normal commercial or trade receivables. Secondly, the Convention should exclude assignments of receivables arising from payment or clearance and settlement systems. It already contained a similar exclusion relating to inter-bank payment systems, but new systems might be developed by participants other than banks, enabling the parties to clear trade payments among themselves.
45. It was certainly not the intention of the United States delegation to enable States to opt out of all the provisions of the Convention under article 41. It should, however, be possible to invoke article 41 in narrow, well-defined areas where exclusion would be consistent with the exclusions in article 4, paragraph 2.
46. **Mr. Morán Bovio** (Spain) said that his delegation welcomed the proposal put forward by the representative of the United States, although it had some reservations about the somewhat broad character of the exclusion relating to assignments of receivables evidenced by a writing transferred by delivery, book entry or control of electronic records. The text would need to be drafted so as to ensure that no further declarations would be possible.
47. **Mr. Berner** (Observer for the Association of the Bar of the City of New York) said that the Mexican State oil company, PEMEX, had devised a form of tri-lateral use of its trade receivables, whereby they were assigned to a European entity with the aim of financing the import of manufactured goods to Mexico. Such a system, which could be of great economic benefit to developing countries with natural resources, clearly fell outside the scope of the United States proposal. It would not be desirable for the Convention to undermine the development of such systems.
48. **Ms. Brelier** (France) was not sure that her delegation could support the drawing up of a restrictive list for article 41. In any case, the Convention's provisions would first have to be reviewed as a whole, an exercise that might take several days.
49. **The Chairman** suggested that the United States delegation should submit its proposal in writing for consideration the following day.
50. **Ms. Sabo** (Canada) said that it was not clear at first glance how the proposals relating to future practices, concerning assignments of receivables arising in transactions in securities or capital markets and settlement systems, differed from the provisions already contained in article 4, paragraph 2. While her delegation continued to favour the deletion of article 4, paragraph 4, and article 41, it looked forward to seeing the proposal of the United States in written form.
51. **The Chairman** said he took it that the Commission wished to suspend its consideration of article 4, paragraph 4, and of article 41 until a written proposal became available.
52. *It was so agreed.*
53. **Mr. Bazinas** (Secretariat) said it was his understanding that the United States proposal concerning capital markets would be very general, seeking to capture whatever did not fall under article 4,

paragraph 2. As for payment or clearance and settlement systems, the proposal was to address systems between entities other than banks, which were covered by article 4, paragraph 2 (d). The other two areas on the list, namely, receivables in negotiable and other instruments and land receivables, were to be included only if discussions with a view to including them in article 4 proved fruitless. With respect to the former, a joint proposal for article 4, paragraphs 1 and 2, would be submitted by France and the United States the following day.

Article 5

54. **Ms. Brelrier** (France) said she recalled that during its consideration of article 24, the Commission had decided to include a definition of "competing claimants" in article 5.

55. **Mr. Bazinas** (Secretariat) said that the issue of competing claimants was addressed in the definition of "priority" in new article 5 (g), the text of which had been circulated.

56. **Mr. Joko Smart** (Sierra Leone) asked why the terms "assignment" and "receivables" were defined in article 2, rather than under "definitions", in article 5.

57. **Mr. Franken** (Germany) said that since the Commission's consideration of the definition of location in article 5 (h) at its previous session, widespread concern had been voiced about the coverage of branch offices of banks and other financial institutions. The best solution would perhaps be for the branches of banks to be deemed to be separate entities. The applicable law would thus be the law of the country where the branch was located, not that of the country where the central administration of the bank was located.

58. **Mr. Stoufflet** (France) and **Mr. Huang Feng** (China) supported the proposal put forward by the representative of Germany.

59. **Mr. Whiteley** (United Kingdom) said that although at the previous session his delegation had supported the idea of a separate rule for bank branches, he personally had since reconsidered his position. While in many instances it was desirable to deem bank branches to be separate entities, that would not always be the case. For example, the capital adequacy of a bank branch would be calculated according to the rules of the jurisdiction of incorporation, not those of the host State. In his view, the location rule in the

Convention as currently drafted was the appropriate one, as the scope of the Convention was limited by the definition of "competing claimant".

60. One of the main legal problems that transfers of receivables posed was that they created divided ownership. The relationship between the debtor and the creditor was changed by the transfer or assignment, so that the debtor must now deal with an assignee. That created problems for the legal system, as an effort had to be made to ensure that the transfer took place as transparently as possible. The debtor should know with whom it was legally bound to treat, and any other party regarding the receivable as a property right should be able to identify its owner. However, assignment also created problems for creditors who dealt with assignors: while the receivable apparently belonged to the assignor, it was not in fact a part of the assignor's estate, but belonged to the assignee. Robert Maxwell had exploited that state of affairs to increase the amount of money lent to him on the basis of assets he did not in fact own. That phenomenon was known as false wealth. The Convention could in a sense be characterized as an instrument for the mutual recognition of false wealth requirements, on the basis of the assignor's location. Where a receivable was assigned by a bank branch, the appropriate place to look for perfection in respect of false wealth requirements might still be the jurisdiction of incorporation of the bank.

61. In the United Kingdom, there were requirements for registration of charges. If a United Kingdom bank made an assignment by way of security, it would be subject to registration in relation to all assets of the company, whether they were located in the United Kingdom or overseas. There were also registration requirements for foreign companies with a place of business in the United Kingdom, in relation to their assets in the United Kingdom. Lastly, the courts had established a notification procedure, known as the Slavenburg procedure, which applied to foreign companies with assets in the United Kingdom that did not have a place of business there. In such cases, a letter must be sent to Companies House to register the charge, and a letter must be received in return, stating that the charge was not registerable. If the procedure was not carried out, there would be no guarantee of priority, should the charge be found to be registerable.

62. If that procedure were applied to the location rules currently contained in article 5, a United Kingdom bank assigning a receivable by way of security would seek to perfect that assignment through registration at Companies House. However, an assignment made by a foreign bank's branch in the United Kingdom would not give rise to a registerable charge in the United Kingdom if the Convention applied. The current United Kingdom law would thus have to be modified.

63. If a foreign branch of a United Kingdom bank were to assign a receivable under the rules proposed by the representative of Germany, the question would arise as to whether registration should take place in the United Kingdom or in the jurisdiction of the branch which had made the assignment. It could be foreseen that the same type of problems might then arise as with the Slavenburg registrations: there would be uncertainty as to whether it was the branch, or the head office that acted as the assignor. That could entail a double perfection requirement. For those reasons, the text should not be amended.

Election of officers (*continued*)

64. **Mr. Franken** (Germany), speaking on behalf of the Group of Western European and other States, nominated Mr. Morán Bovio (Spain) for one of the posts of Vice-Chairman.

65. **Mr. Adensamer** (Austria) seconded the nomination.

66. *Mr. Morán Bovio (Spain) was elected Vice-Chairman by acclamation.*

The meeting rose at 5.10 p.m.



General Assembly

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United Nations Commission on International Trade Law

Thirty-fourth session

Summary record of the 719th meeting

Held at the Vienna International Centre, Vienna, on Friday, 29 June 2001, at 9.30 a.m.

Chairman: Mr. Pérez-Nieto Castro (Mexico)

Contents

Draft Convention on Assignment of Receivables in International Trade (*continued*)

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The meeting was called to order at 9.50 a.m.

Draft Convention on Assignment of Receivables in International Trade (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-5 and A/CN.9/491 and Add.1)

Article 5 (h) (continued)

1. **The Chairman** asked whether the delegations of the United Kingdom and Germany had resolved their differences with regard to the proposal made by the representative of Germany at the previous meeting.

2. **Mr. Franken** (Germany) said that their differences had not been resolved. The key problem was that, as a matter of public policy, the United Kingdom system required registration for the validation of all assignments, wherever they were located.

3. **Mr. Stoufflet** (France) said that the delegation of the United Kingdom seemed to be overestimating the scope of the German proposal. As he understood it, the proposal was simply to consider branches of banks as being autonomous for the purposes of resolving issues of priority. In other respects, they should not be considered as separate legal entities.

4. **Mr. Smith** (United States of America) asked for clarification of whether the proposal was to apply the branch location rule to banks only, or whether it would extend to other financial institutions such as insurance companies and investment banks. It was unclear whether the scope of the proposal was indeed as limited as the representative of France had suggested.

5. **Mr. Bazinas** (Secretariat) said that, as he understood it, France's interpretation of the proposal was more limited in scope than the original proposal for another reason. The representative of France had suggested that the branch location rule would apply only for the purposes of priority issues, in other words solely in relation to article 24. Had he intended to make that restriction, or did he mean that that would simply be the most significant effect?

6. **Mr. Chan** (Singapore) said that all of the issues currently being raised had already been dealt with before. Identical discussions had taken place two years earlier in a session of the Working Group. In view of

the short time remaining, he doubted the usefulness of going back over old ground.

7. He also expressed serious doubts about the wisdom of the German proposal. Foreign banks in Singapore could choose whether to become wholly-owned subsidiaries, thereby constituting a separate corporate entity under the laws of Singapore, or to remain branches and retain the legal personality of the bank of their home country. His delegation would not support a proposal which treated branches separately from the main legal entity, whatever the purpose; for to do so would confuse the internal workings of the corporate entity in the eyes of the public, allowing it to shift assets, obligations or receivables between branches in order to avoid liabilities or enhance profitability, without any transparency and to the detriment of business partners and shareholders.

8. **The Chairman** said that under article 1, paragraph 3, of the UNCITRAL Model Law on International Credit Transfers, branches and separate offices of a bank in different States were regarded as separate banks for the purposes of determining the sphere of application of the Model Law.

9. **Mr. Deschamps** (Canada) said that lengthy discussions had taken place at previous sessions of the Commission in an attempt to find a solution to the problem of a bank's location. It had proved impossible to define a branch as being a separate entity without at the same time identifying the precise location of a receivable. Since the provisions concerning priority constituted one of the most important parts of the draft Convention, it was essential that only one law should apply in the event of a conflict between two assignees. If a loan granted by a bank was assigned, the assignee had to be able to ensure that he had priority, and must therefore be able to identify in which branch the loan was located. Many fruitless attempts had been made to find criteria with which to determine the branch in which a loan was located. Thus, for example, loans were often managed by a different branch from that in which they were registered—not necessarily one located in the same country. Furthermore, during the lifetime of the loan, its location might even be changed; a standard clause in some loan agreements required the bank to relocate the loan in a different country if its remaining in the original location would

result in higher costs for the borrower, for instance because of changes in tax regulations.

10. **Mr. Doyle** (Observer for Ireland) agreed with the representative of Singapore that article 5 (h) should not be up for discussion at all, since it had already been agreed on. The definition of location must therefore remain unchanged.

11. **Mr. Morán Bovio** (Spain) agreed with the delegations of Ireland, Singapore and Canada that unless some radical and innovative proposal were to be made, the debate should not be taken any further. The right to place loans with the branch of their choice was an internal matter for banks, and one with which the Commission was not in a position to interfere, except to specify that, once it had been established, the location of a loan should not be changed.

12. **Mr. Franken** (Germany) said that it was not true that banks were entirely free to decide whether branches should become independent legal entities. The rules of the banking supervisory authorities recognized that banks needed to increase their equity capital in order to support business activities. Consequently, many banks had switched operations in foreign countries from subsidiaries to dependent branches, so that they could rely on the equity capital of the parent company. In Canada, for instance, national regulations had formerly only allowed foreign banks to operate if they were separate entities, but had begun to permit branch activity in view of the increased need for equity capital. A similar situation was arising in Singapore for precisely the same reason. It had to be recognized that operations abroad would increasingly be based on the overall capital position of the parent company. Furthermore, the situation was not as simple as the representative of Spain had suggested: banks were not free to make accounting entries in whatever branch they pleased, for they were bound to comply with the banking supervisory regulations and tax regulations of the country in which the branch was located. Consequently, he urged the Commission to attempt to resolve the issues he had raised.

13. **Mr. Berner** (Observer for the Association of the Bar of the City of New York), endorsing the comments made by the representatives of Germany, France and China, said that it was commonly accepted by the financial markets that banks followed the rules of the country in which they conducted their business. Therefore a branch of a United States bank based in

Germany had to follow German rules, and vice versa. Since third parties were involved, that was not simply an internal matter for banks.

14. **Mr. Al-Nasser** (Observer for Saudi Arabia) supported the comments made by the representatives of France and Germany and the Observer for the Association of the Bar of the City of New York. The representative of Germany was an expert in banking matters and was familiar with the workings of the supervisory authorities. Account should also be taken of the new rules established by the World Trade Organization governing the opening of branches.

15. **Mr. Markus** (Observer for Switzerland) supported the proposal made by the representative of Germany.

16. **Mr. Chan** (Singapore) said that while there were strong arguments on both sides, the location rule remained fundamental for the establishment of certainty. While it was true that, in order to remain competitive and in the context of market opening measures, banks were tending to operate through branches rather than subsidiaries, that was all the more reason to maintain the location rule as it stood in the text. Banks should not be allowed to have things both ways, by retaining branches for certain purposes but not for others.

17. **Mr. Ducaroir** (Observer for the European Banking Federation) said that he fully supported the German proposal and was not at all convinced by the arguments put forward by the representatives of the United Kingdom and Canada. As a practitioner, he found it difficult to understand that the draft Convention should establish a rule on location that did not apply to bank branches, whether acting as assignees or as assignors.

18. **Mr. Whiteley** (United Kingdom), summarizing his delegation's position, said that the key point was not where the branch was located but where the affairs of the bank would be wound up in the event of insolvency. In most cases, that would be the place of incorporation.

19. **Ms. Straganz** (Austria), **Mr. Medin** (Sweden) and **Ms. Gavrilescu** (Romania) expressed support for the proposal by the representative of Germany.

20. **Mr. Smith** (United States of America) asked whether he was correct in interpreting the proposal by

the representative of Germany as applying only to banks and their branches and not to other financial institutions, and as applying only to the definition of location, so that the question of whether a bank or the branch of a bank was located in a particular country was important not only for the issue of priority but also for the issue of nationality and the scope of the Convention as a whole. He also wished to know whether he was correct in assuming that the issue was relevant only when the bank was the assignor or the assignee, since a rule already existed in the case of debtors, as noted by the representative of the European Banking Federation.

21. **Mr. Franken** (Germany) said that all three assumptions regarding his proposal were correct.

22. **The Chairman** noted that a majority of members were in favour of the concept underlying the German proposal, which was consistent with the wording of article 1, paragraph 3, of the UNCITRAL Model Law on International Credit Transfers.

23. **Ms. Sabo** (Canada) said that such a radical change concerning a fundamental point could not be adopted until a text in writing was available for consideration.

24. **Mr. Chan** (Singapore) said that the term "bank" would take on a new meaning if the proposed amended version of article 5 (h) was adopted. He wondered whether it was used consistently in that sense throughout the Convention.

25. **Mr. Deschamps** (Canada) said that adoption of the proposed new wording would call for a review of the definition not only of a bank but also of a branch of a bank. It would also be necessary to develop criteria for establishing a link between a receivable and the branch in question.

26. **Mr. Adensamer** (Austria) said that his delegation's support for the proposed amendment had not been subject to the understanding that it was restricted to banks. It had been interpreted as applying to all debtors. The Commission should not establish special legislation for banks and there was no need to redefine either a bank or a branch.

27. **Mr. Al-Nasser** (Observer for Saudi Arabia) proposed using the definition of a bank and a branch contained in the UNCITRAL Model Law on International Credit Transfers.

28. **Mr. Sekolec** (Secretary of the Commission) said that in the context of the Model Law the term "bank" meant different things in different countries. In an attempt to clarify matters, article 1, paragraph 2, of the Model Law stated that the law also applied to other entities "that as an ordinary part of their business" engaged in executing payment orders.

29. **The Chairman** said that the debate on article 5 (h) would not be closed until the proposed amendment had been circulated in writing. He took it, however, that a majority in the Commission supported the underlying concept.

Article 5 (g)

30. **Mr. Smith** (United States of America) said that the version of article 5 (g) contained in document A/CN.9/XXXIV/CRP.2 addressed priority only with respect to a competing claimant. But a competing claimant was narrowly defined and would not include a competitor who was not a competing claimant within the meaning of the definition of priority. By virtue of the operation of new paragraph 3 of article 26 (A/CN.9/XXXIV/CRP.2/Add.1), parties who were not competing claimants but who were entitled to priority could enjoy protection. The definition of priority should therefore be extended to include other persons. His proposal was to add the words "or other person" after the words "the right of a competing claimant", in article 5 (g).

31. **Mr. Kobori** (Japan) said he had some difficulty in understanding the phrase "to the extent relevant for such purpose" since no purpose had previously been specified. He also failed to see how a right could "include the determination". He therefore suggested an amendment along the following lines: "to the extent relevant for the purpose of the determination of such preference". He further suggested that the opening phrase should be amended to read: "'Priority' means preference of the right of a person over the right of a competing claimant".

32. **Mr. Zanker** (Observer for Australia) said he would welcome some clarification of the point regarding competing claimants made by the representative of the United States. By definition, where different claims existed for a particular sum of money, the priority rule determined which claim prevailed, but those involved were necessarily both competitors and claimants.

33. **Mr. Smith** (United States of America) said that article 26, new paragraph 3, preserved certain priority rights for particular parties. One such party could be a transferee for value of a deposit or securities account or of funds in the account. But the definition of a competing claimant would not necessarily cover all the parties protected under new paragraph 3. As the definition of priority referred only to "the right of a person in preference to the right of a competing claimant", it would not include other protected parties that fell outside the scope of the definition of a competing claimant. His proposed amendment would give full effect to the Commission's policy decision without altering the substance of the meaning of priority elsewhere.

34. **Ms. Walsh** (Canada) requested time to consider the implications of the amendment proposed by the United States.

35. During the discussion of article 24, the Secretariat had stated that the question of whether the definition of priority should include a reference to any steps that had to be taken to render an assignee's right effective against third parties would be taken up in connection with draft article 8. Any decision on the wording of article 5 (g) should therefore be made subject to the outcome of the subsequent discussion of article 8.

36. **Mr. Bazinas** (Secretariat) confirmed that it was the Secretariat's understanding that the point would be taken up in connection with article 8. The definition of a competing claimant in article 5 (m) did not include a securities intermediary who had a right in the receivable as original collateral. Article 26 covered a conflict between, for example, an assignee with an interest in a securities account as proceeds and a securities intermediary with an interest in the securities account as original collateral, who was not a competing claimant within the meaning of article 5 (m). That, as he saw it, was the reason for the proposal to insert the words "or other person" in article 5 (g). It would not change the substance of the definition of priority, but would bring it into line with article 26.

37. **Mr. Deschamps** (Canada) asked whether the United States proposal implied that article 26, paragraph 3, protected persons who did not come within the scope of paragraph 2. With regard to the example cited by the Secretariat, he submitted that a securities intermediary would be a competing claimant

by virtue of asserting a claim to a right in the proceeds; the securities intermediary would be a creditor of the assignor. Article 26, paragraph 2, referred to proceeds received by the assignor and the purpose of paragraph 3 was to protect persons dealing with the assignor. He was not necessarily opposed to the proposed amendment in principle but he wished to be sure of its implications. It might be wise to take another look at other provisions of the Convention that referred to "priority" or "competing claimant" and that might inadvertently be affected by the amendment.

38. **The Chairman** asked the representative of Canada whether he considered that the matter could be referred to the drafting group on the understanding that the Commission supported the principle underlying the proposed amendment.

39. **Mr. Deschamps** (Canada) said that his delegation would need time to ascertain whether it was merely a drafting matter or whether it raised points of substance affecting other provisions of the Convention.

40. **Mr. Doyle** (Observer for Ireland) said that while his delegation had no objection in principle to the United States proposal, the suggested definition was so broad as to be of little practical use. If the concern related to the persons referred to in article 26, new paragraph 3, it might be sufficient simply to refer directly to those persons.

41. **Mr. Smith** (United States of America) said that no substantive change was proposed, nor was there any intention to open up the definition of priority. It was simply that elsewhere in the Convention—for example, in article 24, paragraph 1 (a)—the term "priority" was used in reference to a competing claimant. If it was felt that a substantive change was involved, his delegation would be happy to consider some other form of words. Otherwise, the matter could be left to the drafting group.

42. **Mr. Zanker** (Observer for Australia) said that, on reconsidering the original wording of article 5 (g), the drafting group had produced the text contained in document A/CN.9/XXXIV/CRP.2. Perhaps it would have sufficed if the group had merely added to the original text contained in document A/CN.9/489 the phrase "to the extent relevant for such purpose". While recognizing that the Canadian delegation had reservations as to whether the proposal involved a substantive change, which would have a consequential

effect on other provisions, his delegation was prepared to proceed on the basis that the United States delegation was correct in saying that no substantive change was involved.

43. **The Chairman** said he took it that the Commission wished to adopt the United States proposal, subject to scrutiny by the drafting group and a decision as to whether it would have an impact on other articles.

44. *It was so decided.*

Article 5 (k)

45. **Mr. Ducaroir** (Observer for the European Banking Federation) said that the text of article 5 (k) was largely satisfactory, but contained the potential for divergences of interpretation, which could result in conflicts before the courts, regarding the respective risks borne by the counter-parties to a transaction. To reduce that risk, financial contracts were, in practice, often accompanied by a collateral or credit support arrangement, which formed an integral part of the contract. In order to avoid any ambiguity concerning such arrangements, the words "mentioned above" should be followed by the words "and any and all collateral and credit support related to any transaction mentioned above". That form of words was the one suggested by the Financial Markets Lawyers Group in document A/CN.9/490/Add.4.

46. **The Chairman** recalled that a similar proposal had been discussed and rejected at the thirty-third session.

47. **Mr. Smith** (United States of America) said that, if a derivatives contract obligation was secured by a receivable to which the Convention would normally apply, all the rules under the Convention as currently drafted would apply to that receivable. That outcome seemed correct to his delegation. However, under the European Banking Federation's proposal, a receivable that happened to secure a financial contract would not be governed by the Convention. That could give rise to numerous problems, subjecting assignments to different regimes depending on the nature of the obligation secured by the receivable. He saw no reason for the Commission to change its view simply to accommodate receivables that happened to secure a financial contract.

48. **Mr. Whiteley** (United Kingdom) said that, while his delegation would be happy to retain the current text, it was true that anomalies existed. Collateral arrangements with regard to derivatives transactions might be complex but were an important part of the way the derivatives market functioned. A derivatives transaction differed from a secured loan in that the potential exposure of the counter-parties could change over time. For example, a party borrowing and repaying US\$ 100 created an exposure of US\$ 100 to the lender; if, however, he repaid €85, and the parties pledged that they would reverse the exchange in three years' time, the value of the contract would change depending on whether the euro depreciated or rose against the dollar. When a party took collateral for a derivatives contract, therefore, there must be a promise to provide collateral not just at the beginning of the contract but throughout the life of the transaction. As exposure changed, the parties adjusted the amount of collateral held, so that neither held too much collateral or had too much exposure. The current practice was either to use a security interest or to make an arrangement often called a "title transfer", involving the sale and buyback of the relevant assets. The party who had exposure had the right to demand the delivery and the absolute ownership of fungible financial assets in exchange for a promise to give back an equivalent asset either when the exposure dropped or if the counter-party defaulted. The current wording of the provision would cover collateral arrangements structured as a title transfer, because it would constitute the spot transfer of a security and a forward on the security, both of which would be part of the netting agreement; but it would not cover arrangements structured as a security interest, even though the economic effect was largely the same, the main difference being that the party receiving collateral under a security interest could not use that collateral as though it were his own assets (unless the relevant agreement was a New York law security interest). To create a distinction between the two arrangements unnecessarily distorted the financial markets, and it might be appropriate for the Commission to adjust the wording so as to enable current practice to continue.

49. **The Chairman** said that the Commission did not have time to reconsider a proposal that had already been rejected. Unless there was strong support for the proposal, the original draft should remain unchanged.

50. **Mr. Deschamps** (Canada) said that, for the reasons given by the representative of the United States and for other reasons that he could cite if necessary, his delegation was opposed to the amendment proposed by the Observer for the European Banking Federation.

51. **The Chairman** said that the text of article 5 (k) would remain unchanged.

The meeting was suspended at 11.15 a.m. and resumed at 11.50 a.m.

Article 5 (l)

52. **Mr. Ducaroir** (Observer for the European Banking Federation) proposed that the first sentence should be amended to read: " 'Netting agreement' means an agreement between two or more parties that provides for one or more of the following: ". The reason was that netting agreements were sometimes multilateral, involving several parties. The suggested addition would serve to dispel any ambiguity.

53. *The proposal was approved.*

54. **Mr. Kobori** (Japan) suggested that, when discussing draft article 9, the Commission should consider including a definition of the term "undivided interests" in draft article 5 (h).

Article 5 (h) (continued)

55. **Mr. Franken** (Germany), reverting to article 5 (h), proposed the following addition, to follow the third sentence: "If the assignor or the assignee is engaged in the business of banking by making loans and accepting deposits, a branch of that assignee or assignor is a separate person".

56. **Mr. Brito da Silva Correia** (Observer for Portugal) said that the formulation proposed by the representative of Germany should be amended to include the words "if the assignor has a place of business in more than one State or has a branch in another State, the place of business is that of the branch".

57. **Mr. Whiteley** (United Kingdom) said that his delegation shared the concerns of the observer for Portugal. The German proposal should specify that the branch of the assignor or assignee was deemed to be a separate person only for the purposes of that definition. The proposal should refer not only to the business in

which the relevant person was engaged, since some persons might not be legitimately engaged in such business, but also to authorization.

58. **Mr. Salinger** (Observer for Factors Chain International) wished to know why it was necessary to refer to the location of the assignee, since the main purpose of the German proposal was to deal with priorities that required specification of the assignor's location. The inclusion in the proposal of a reference to the assignee would have peculiar results in the factoring business, since some factoring companies, particularly in Germany, were constituted as banks, while others were not.

59. **Mr. Franken** (Germany) said that, since some delegations had expressed concern about the creation of a new legal term under the Convention, the second part of the proposal could read "... is deemed a separate person for the purpose of this definition". With regard to the issue raised by Factors Chain International, his delegation could accept the deletion of the words "or the assignee" from its proposal.

60. **Ms. McMillan** (United Kingdom) proposed that the words "If the assignor or the assignee is engaged in the business of banking ..." should be amended to read "If the assignor is authorized to engage in the business of banking ...". If the proposed text did not contain the idea of authorization, the Convention could be interpreted as including the activities of unauthorized entities, such as loan sharks.

61. **Mr. Franken** (Germany) said that his delegation accepted the United Kingdom's proposal.

62. **Mr. Deschamps** (Canada) inquired whether Germany's proposal implied that any branch within the same State was a separate legal entity. He also pointed out that in Canada foreign banks were allowed to carry on business through branches and that, like many other countries, Canada made a distinction between full-service branches and lending branches, which were not allowed to accept deposits. A number of foreign banks in Canada had decided to operate through lending branches, since the regulations governing such branches were less stringent. The proposal by Germany would cover only full-service branches.

63. **Mr. Franken** (Germany), replying to the first question raised by the representative of Canada, said that the proposal referred to entities active in more than one State. In order to allay the concerns of some

delegations, the second part of the proposal could be amended to read "... a branch of that assignor in another State is deemed a separate person for the purpose of this definition".

64. With regard to Canada's concern about bank branches that engaged only in lending activities, he said that the United Kingdom's proposal to include a reference to the authorization of a person to engage in banking in the broadest sense would resolve Canada's concerns. The proposal would thus read: "If the assignor is authorized to be engaged in the business of banking, a branch of that assignor in another State is deemed a separate person for the purpose of this definition."

65. **Mr. Morán Bovio** (Spain) inquired whether the German proposal would make it easier for the assignee to determine which law was applicable to it, since that would save the assignee time and money. He also wished to know how a simple agency in another country could be distinguished from an entity that was fully operational and registered in that country. He would welcome an explanation of the economic impact of the German proposal.

66. **Mr. Franken** (Germany), replying to the questions raised by the representative of Spain, said that the proposal would indeed make life easier for the assignee. In a transaction, it was usually necessary to check the law of the assignor and possibly the law of the assignee, as well as the law to be applied at the place of business. The proposed amendment provided that the assignee would need to know only the law of the place of business.

67. **Mr. Huang Feng** (China) proposed that the words "for the purpose of this Convention" should be included in the German proposal. Reference to the assignee should be retained, since banks very often bought receivables and acted as assignees.

68. **The Chairman** pointed out that draft article 5 began with the words "For the purposes of this Convention", and wondered whether the representative of China would consider that reference to be sufficient. Delegations should indicate whether or not they supported China's proposal to retain the reference to the assignee in the German proposal; if they did not wish to do so, the proposal would remain as it stood.

69. **Mr. Kobori** (Japan) said that his delegation supported China's proposal to retain the reference to the assignee in the German proposal.

70. **Mr. Brink** (Observer for the European Federation of Factoring Associations—Europafactoring) inquired whether receivables from the entities referred to in the proposed definition also had to relate to the relevant business, or if all receivables of such entities were affected by that rule, since a bank might have receivables from loans or credits or from other types of business. That might result in the conduct of an international transaction in a case where a bank changed administration of an account from the central office to a branch, or vice versa. If a branch was deemed to be a separate entity and it was assumed that the branch was located in another State, that might trigger the application of the Convention with respect to the transaction, which was in fact not a transaction at all but merely an administrative change within the bank. Furthermore, once the Convention had been applied, it would continue to govern any further assignment in accordance with the rules governing subsequent assignments. He wondered whether that effect was intentional.

71. **Mr. Smith** (United States of America) said that, in order for the branch bank rule to apply, it was necessary to determine in what activity the assignor was engaged. If the assignor was authorized to engage in the business of banking but did not actually engage in that business, the assignor would be treated like any other assignor and would not be subject to the branch bank rule. It was unclear whether the authority to conduct business referred to the authority of the head office or to the authority of the branch in the country in which the branch engaged in the banking business. His delegation was strongly in favour of retaining the original language of the German proposal, which referred to the assignor as being in the business of banking and also indicated that banking meant making loans and accepting deposits.

72. **Mr. Zanker** (Observer for Australia) said that perhaps article 5 (h) should be left as it stood. The introduction of new rules about banks having branches that were separate legal entities was unnecessary, since a prudent bank or other entity would specify the law applicable to contracts relating to assignments. It seemed as if the issue was being made far more complicated than it needed to be.

73. **The Chairman** urged delegations to attempt to resolve their differences regarding article 5 (h) in informal consultations with the delegation of Germany before the 720th meeting.

The meeting rose at 12.30 p.m.

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United Nations Commission on International Trade Law

Thirty-fourth session

Summary record of the 720th meeting

Held at the Vienna International Centre, Vienna, on Friday, 29 June 2001, at 2 p.m.

Chairman: Mr. Pérez-Nieto Castro(Mexico)

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Draft Convention on Assignment of Receivables in International Trade (*continued*)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum.

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The meeting was called to order at 2.10 p.m.

Election of officers (continued)

1. **Ms. Ladová** (Observer for the Czech Republic), speaking on behalf of the Group of Eastern European States, nominated Ms. Gavrilescu (Romania) for one of the posts of Vice-Chairman.
2. *Ms. Gavrilescu (Romania) was elected Vice-Chairman by acclamation.*
3. **Mr. Ishii** (Japan), speaking on behalf of the Asian Group, nominated Ms. Zhou Xiaoyan (China) for one of the posts of Vice-Chairman.
4. **Mr. Meena** (India) seconded the nomination.
5. *Ms. Zhou Xiaoyan (China) was elected Vice-Chairman by acclamation.*

Draft Convention on Assignment of Receivables in International Trade (continued) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-5 and A/CN.9/491 and Add.1)

Article 5 (h) (continued)

6. In response to a question from **the Chairman**, **Mr. Franken** (Germany) said that the observer for Factors Chain International had withdrawn his objection to the German proposal. In accordance with the wishes of the representative of China and others, the reference to the assignee was to be retained in the proposal.
7. **Mr. Deschamps** (Canada) said that his delegation was in favour of retaining the current definition of location. The German proposal would entail a fundamental change. Its purpose was to ensure that the assignor or the assignee would be located at the branch with the closest connection with the assignment, but he did not believe that that result could be achieved by deeming branches to be separate legal persons.
8. A branch in one country that lent money to a customer and took an assignment of receivables from him as security, would, if the German proposal were adopted, be a separate legal entity. If the bank then lent money to the same customer through a branch in another country, would the proposal mean that the loans made by the second branch would not be secured by the assignment? A borrower that was a

multinational corporation frequently had places of business in many countries and borrowed from a branch of the bank in each country. If such a borrower granted an assignment of its receivables as security to a bank with branches in three different countries, would they be three different entities, and the assignment of receivables be deemed to be an assignment with three different assignees? Those were just a few illustrations of the many difficulties created by the proposal.

9. **Mr. Doyle** (Observer for Ireland) said it had been his understanding that at its previous meeting the Commission had approved the German proposal in substance. He failed to understand why some delegations were debating its merits again, and he urged the Commission to close the debate.

10. **The Chairman** said that the Commission had indeed initially approved the concept of the German proposal but that once it had been formally tabled, questions had been raised on the substance because of the divergences between that proposal and the text of the Convention. He recalled that the German proposal had already been tabled and discussed twice before at previous sessions and had each time been rejected. It had now been resubmitted, and divergent opinions had again been expressed on important points. After five years, time had now run out for discussion, and he would therefore ask the German delegation to withdraw its proposal.

11. **Mr. Franken** (Germany) said that all who were familiar with the banking business saw a need for his delegation's proposal; indeed, the European Central Bank had urged the German Government to raise the matter again. However, if there was no agreement in the Commission, his delegation was prepared to withdraw the proposal.

12. **Ms. Brelrier** (France) said she wished it to be recorded that the withdrawal of the German proposal would present France with a serious problem when it came to ratification of the Convention.

13. **Mr. Huang Feng** (China) expressed his delegation's regret that the German proposal had been withdrawn.

14. *Draft article 5 (h) was approved.*

Article 6

15. *Draft article 6 was approved.*

Article 7

16. *Draft article 7 was approved.*

Article 8

17. **Mr. Kobori** (Japan) said that the wording of draft article 8 was somewhat unclear. He therefore proposed the deletion of the words "if any form requirements exist", which were ambiguous.

18. **The Chairman** said that article 8 was a rule of conflict and determined the validity of the form of the assignment with respect to the law of the State in which the assignor was located. If that law established any form requirements, they had to be met for the assignment to be valid. However, the law of the State in which the assignor was located might in turn determine the application of some other law which might well be a different one by virtue of the rules of private international law.

19. **Ms. Walsh** (Canada) said her delegation considered that the language of article 8 was too broad. In its analytical commentary on article 8 in document A/CN.9/489 the Secretariat had speculated that "form" in the context might mean, *inter alia*, notification of the debtor and registration in a public registry of notice of the assignment. Her delegation believed it was the Commission's policy that when such form requirements existed, they related to the area of priority and would be covered by the choice-of-law rule in articles 24 and 31. Uncertainty would ensue if such matters were instead covered by article 8, with the result that the law governing those issues could be either the law of the assignor State or any other law that might be applicable by virtue of the rules of private international law. In its comments contained in document A/CN.9/490/Add.5 her delegation had therefore suggested that article 8 should be reworded to make it clear that "form" in that article referred only to the form of a contract of assignment and only to issues between the assignor and assignee and would not affect third parties. Any effects of the assignment against third parties were properly dealt with under articles 24 and 31, and it might therefore be preferable to delete draft article 8.

20. She asked the Secretariat to amplify the proposal in its note on article 24 (A/CN.9/491, para. 18) that the definition of "priority" be expanded to include any

requirements necessary to make an assignment effective as against third parties.

21. **Mr. Bazinas** (Secretariat) recalled that the Commission had kept pending the issue of an additional provision on form for chapter V until it had considered article 8. The Secretariat had proposals both for article 8 and for the new provision in chapter V.

22. As the representative of Canada had pointed out, there seemed to be an inconsistency between article 8 and article 24 since they both covered the form of assignment, but referred it to different laws. Article 8 provided for referral to the assignor's law or to other laws by virtue of the applicable rules of private international law. Article 24 referred priority to the law of the assignor's location. Priority normally included the steps to obtain priority which, as was clear from the draft Hague Conference text on the law applicable to securities held with an intermediary, should be referred to the same law. To address that problem the Secretariat had suggested, in paragraph 34 of document A/CN.9/491, wording to the effect that no form was necessary as between the assignor and the assignee and as against the debtor. The Working Group had agreed that the requirement as to form was not an issue in the relationship between the assignor and the assignee and not an issue as against the debtor, who was sufficiently protected by the requirement for a written notification. The real need for notification was to protect third parties. The Secretariat also suggested that, in the definition of priority, wording should be included to the effect that the steps to be taken for obtaining priority should be left to the law of the assignor's location.

23. As to the proposed new provision on form in chapter V, paragraph 21 of document A/CN.9/491 contained a proposal to adopt language along the lines of article 11 of the Convention on the Law Applicable to the International Sale of Goods, which dealt with the form of the contract of assignment.

24. **Mr. Morán Bovio** (Spain) thanked the Secretariat for its proposals, both of which would improve the text of the Convention and should be referred to the drafting group.

25. **Mr. Cohen** (United States of America) said that the useful analyses provided by the delegation of Canada and the Secretariat had convinced his delegation that article 8 as it stood was inadequate for

its purposes. The Secretariat's proposal in paragraph 34 of document A/CN.9/491 for a form-free assignment would have the effect of validating some assignments that might not be valid under the domestic law that would otherwise be applicable. He therefore endorsed the proposal of the representative of Canada to delete article 8.

26. **Mr. Stoufflet** (France) said that his delegation did not feel that article 8 was essential. It could not, however, accept the Secretariat's proposal for a form-free assignment since some provisions of France's internal legislation on the form of the assignment were stricter than the one proposed and a conflict of requirements would result.

27. **The Chairman** said that the Secretariat had informed him that it agreed with the proposal by the representative of Canada and was withdrawing its support for a revised article 8.

28. *Draft article 8 was deleted.*

Article 5 (g) (continued)

29. **The Chairman** recalled that the Secretariat's suggestion to amend the definition of priority in article 5 (g) by the addition of the words "and any steps necessary to render a right effective against a competing claimant" was still pending. He asked for the views of delegations on that proposal.

30. **Ms. McMillan** (United Kingdom) wondered whether it was proposed that the definition of priority in article 5 (g) should include compliance with the requirements as to form.

31. **Mr. Bazinas** (Secretariat) drew attention to paragraph 18 of document A/CN.9/491, which contained the suggestion by the Secretariat for a definition of priority. In the discussion of that definition the Secretariat had indicated that it would withhold the last few words of its proposal, namely, "and any steps necessary to render a right effective against a competing claimant", until the Commission had had an opportunity to consider the issue of form in article 8. The suggestion was therefore now before the Commission for consideration.

32. **Ms. Walsh** (Canada) and **Mr. Stoufflet** (France) said they were in favour of the addition of the proposed wording.

33. *Draft article 5 (g), as amended, was approved.*

34. *Draft article 5 as a whole, as amended, was approved.*

Form (new provision in chapter V)

35. **The Chairman** drew attention to the Secretariat's proposal in paragraph 21 of document A/CN.9/491 for a new provision in chapter V. That proposal was now before the Commission.

36. **Mr. Morán Bovio** (Spain) supported the inclusion of the proposed provision, which would clarify the text on points that would be important for States in ratifying the Convention.

37. *The text of the new provision on form in chapter V was approved.*

Article 9

38. **Mr. Ikeda** (Japan) sought clarification concerning the concept of undivided interests, which existed in Anglo-Saxon law, but did not figure in Japanese civil or commercial law. Article 9, paragraph 1, of the Convention merely stated that an assignment of one or more existing or future receivables and parts of or undivided interests in receivables was effective, without specifying in what way it was effective, and paragraph 89 of document A/CN.9/489 cast no further light on the matter. Could the assignee of the undivided interest demand payment directly from the debtor? If the answer was in the affirmative, how much could the assignee claim? Was it the total amount of the original receivable, or just the percentage that the assignee had contracted with the assignor? If two assignees had undivided interests in the same receivable, would not a problem of competing claims arise? There should be some clarification as to the handling of such matters in the initial contract.

39. **Mr. Stoufflet** (France) said that the concept of undivided interests existed in French civil law, and that when applied to goods that were by definition divisible, such as money, the assignment of an undivided interest would not raise any special problems, and would be governed by the provisions already approved by the Commission. In the case of a notification of a partial assignment, the debtor would be able to choose between making full payment to the assignor, thus acting as if it had not received notification of the partial assignment, or paying the assignor only the

portion which had not been assigned, and paying the assignee the part which had been assigned.

40. **Mr. Bazinas** (Secretariat) suggested it might be helpful if the delegation of Japan could identify the specific problems to which it believed article 9 could give rise and suggest possible solutions.

41. **Mr. Suk Kwang-hyun** (Observer for the Republic of Korea) said it had initially been his understanding, on the basis of his previous experience of common-law countries, that in the case of an assignment of a contractual right to payment the assignee would have a direct claim or right against the debtor, whereas in the case of an assignment of undivided interests, the assignee might not have that right. The assignment of undivided interests in payment might thus be similar to the assignment of a beneficial interest, whereby the right as such was not transferred or assigned to the assignee. If that was the case, then the first question raised by the representative of Japan must be answered. The issue was related to article 12, which addressed the transfer of security rights. According to the current draft, a property right securing payment of the assigned receivable would be transferred by virtue of the assignment. It would be advisable to make a distinction between the assignment of a contractual right and the assignment of an undivided interest in payment. In the case of an assignment of a contractual right, the current provision would be correct. However, in the case of an assignment of undivided interests in receivables, the undivided interest in the security, rather than the security itself, should be transferred.

The meeting was suspended at 3.20 p.m. and resumed at 3.45 p.m.

42. **Mr. Ikeda** (Japan) said that the concept of undivided interest was very special, and did not correspond to the French notion of "*droits indivis*". He requested clarification of the effectiveness of an undivided interest, in terms of its results in the field of financial operations.

43. **Mr. Whiteley** (United Kingdom) said that if two people married and decided to buy a house, they would normally do so using an undivided interest. They would probably borrow money, and would hold the house jointly, subject to the interest of the lending bank. If the lending bank had to foreclose, it would be

taking an asset away from both, but it would be enforcing against only a single asset. If the two subsequently divorced and separated their interests in the property, the house would then be held in parts. If the bank were to foreclose, it would have to enforce against each part separately. The language of draft article 9 was simply intended to convey the idea that in some situations two people could hold property as if it were a single asset and they were one person, and that in other situations they could hold property and their respective interests in that property could be clearly demarcated.

44. **Mr. Ikeda** (Japan) proposed that a definition of "undivided interest" should be added to article 5. If there was no support for his proposal, he would withdraw it.

45. **The Chairman** noted that there appeared to be no support for the proposal.

46. **Mr. Bazinas** (Secretariat) said that paragraph 35 of document A/CN.9/491 contained a suggestion by the Secretariat for a reformulation of article 9, paragraph 1, intended to ensure that the provision did not inadvertently result in the validation of an assignment of future receivables—including consumer receivables, pensions and wages—prohibited by law.

47. **Mr. Cohen** (United States of America) supported the reformulation suggested by the Secretariat. However, he felt that the new wording should retain the concepts of "future receivables and parts of or undivided interests" and "one or more", which had apparently been inadvertently omitted from the Secretariat's proposal.

48. **Mr. Bazinas** (Secretariat) said it was his understanding that the proposal was to retain the original wording, replacing the words "is effective" with "is not ineffective ... on the sole ground that".

49. **Mr. Cohen** (United States of America) said that his delegation was in complete agreement with that formulation, with the exception of the use of the word "sole", which was no longer appropriate, as three different grounds would be described.

50. **The Chairman**, noting that the Commission agreed on the principle of the drafting change suggested by the Secretariat as orally revised by the representative of the United States, said he took it that the Commission wished to refer article 9 to the drafting group.

51. *On that understanding, draft article 9 was approved.*

Article 10

52. **Mr. Bazinas** (Secretariat) said that for the reasons set out in paragraph 36 of document A/CN.9/491, the Secretariat suggested the deletion of the article.

53. **Mr. Deschamps** (Canada) said that he concurred with the suggestion of the Secretariat.

54. *Draft article 10 was deleted.*

Article 11

55. **Mr. Bazinas** (Secretariat) said that paragraph 37 of document A/CN.9/491 contained a suggestion to recast article 11, paragraph 3, to reflect more accurately the intentions of the Commission. The Secretariat presented three options. The first would involve a statement to the effect that the article did not apply to the assignment of financial service receivables. While that term might be somewhat ambiguous, it already figured in article 11, paragraph 3 (a). Furthermore, it might be difficult to come up with a uniform definition.

56. A second possibility would be to identify the types of financial service contracts that must be excluded from the scope of article 11. Two such types of contracts were loan agreements and insurance policies.

57. The third option would be to limit the scope of article 11 to the assignment of future receivables or receivables that could not be individually identified, without recourse to a list. Article 11 would thus not apply to the assignment of a single, existing receivable. The reasoning behind that proposal was that it was easier for the assignee to know whether there was an anti-assignment clause where there was a single contract. Where there was a multiplicity of contracts, it was difficult or impossible for the assignee to check all of them to determine whether there was an anti-assignment clause.

58. **Mr. Whiteley** (United Kingdom) pointed out that article 11, paragraph 1, in its current formulation would apply to credit card transactions. By excluding financial service contracts, the Convention might also exclude such transactions, as they involved an extension of credit and might be categorized as financial service contracts.

59. The exclusion of financial service contracts or the reference to a single, existing receivable would not cover the situation of swaps and annuities. Swaps were not financial service contracts, as the parties entered into them together as principal, each making payments and managing the risk independently of the payments it received. As for annuities, the Commission must consider whether annuity payments were to be considered as a single receivable or as multiple receivables. If one of the texts suggested by the Secretariat were approved, there should be a reference not only to financial service contracts, but also to financial contracts generally.

60. **The Chairman** noted that there appeared to be no support for any of the Secretariat's suggestions for amendment.

61. **Ms. Brelrier** (France) requested clarification about the use of the bracketed word "goods" in article 11, paragraph 3 (a).

62. **Mr. Bazinas** (Secretariat) said that the wording in question was the subject of paragraph 30 of document A/CN.9/491. The term "goods" had been placed in square brackets because the French text, "*biens meubles corporels*", raised the question whether general intangible property (i.e. intellectual or industrial property or other information) was included. Since intangibles were apparently covered in subparagraph (b), the Commission might wish to remove the square brackets from subparagraph (a) and explain the matter further in the commentary. The same issue arose in article 12, paragraph 4 (a).

63. **Ms. Brelrier** (France) drew attention to her Government's comments on article 11, paragraph 3 (a), in document A/CN.9/490/Add.1. For the reasons set forth in that document, the word "goods", in subparagraph (a), should be understood as covering both tangible and intangible movable property. The list in subparagraph (b) was not sufficient. The words "or other information", at the end of subparagraph (b), should be replaced by "or other intangible property (*ou d'autres biens incorporels*)".

64. **Mr. Whiteley** (United Kingdom) said that his delegation intended to propose some changes to article 4, paragraph 3, relating to the exclusion of land, and that if its proposal was accepted then the reference to "real estate" in article 11, paragraph 3 (a), should also be changed to "land".

65. Concerning the types of asset covered, a reference to "any other intangible property" might include financial contracts. Was it the Commission's intention to establish such a wide scope for article 11, paragraph 1? His delegation had certain reservations even with regard to the use of the word "goods": some financial contracts might involve the supply of commodities such as grain or oil. Bullion, too, could be considered as goods. While sympathizing with those delegations that considered the wording to be imprecise, he felt that it should not be reformulated.

66. **Mr. Sigman** (United States of America) said that while his delegation had no objection to the inclusion of certain intangibles such as goodwill, and would support the inclusion of a carefully circumscribed description of intangibles, it shared the concern of the representative of the United Kingdom that financial services might be considered as intangible property. The French proposal was too broad. Perhaps it could be left to the drafting group to find an acceptable wording.

67. **The Chairman** noted that the Commission accepted in principle the idea that intangible assets should be included, and that the exact wording should be referred to the drafting group. He took it that the Commission also wished to remove the brackets from around the word "goods".

68. *On that understanding, draft article 11 was approved.*

Article 12

69. **Mr. Bazinas** (Secretariat) said that, as in the case of article 11, the brackets around the word "goods" in article 12, paragraph 4 (a), should be removed.

70. **Ms. Brelrier** (France), supported by **Mr. Al-Nasser** (Observer for Saudi Arabia), said that, as in the case of article 11, the words "or other information", in paragraph 4 (b), should be replaced by a reference to other intangible assets.

71. **Mr. Kobori** (Japan) said that Japanese internal law provided for special types of mortgages that were not transferable. The words "if such right is transferable under the law governing it" should therefore be added at the end of the first sentence of paragraph 1, to cover such cases.

72. **Mr. Bazinas** (Secretariat) said that if there was a statutory limitation on assignment under Japanese law, perhaps it would be preserved under the terms of article 9, paragraph 3.

73. **Mr. Kobori** (Japan) said that his delegation's concern related, not to the limitation of assignment, but to the transferability of the special type of mortgage. That question was not addressed by article 9, paragraph 3.

74. **The Chairman** noted that there was no support for the Japanese proposal.

75. *Draft article 12 was approved.*

Article 13

76. *Draft article 13 was approved.*

Article 14

77. *Draft article 14 was approved.*

Article 15

78. *Draft article 15 was approved.*

Article 16

79. *Draft article 16 was approved.*

Article 17

80. **Ms. Brelrier** (France) introduced a proposal to add a third paragraph to draft article 17. The proposal superseded an earlier proposal circulated in writing, and would read: "This Convention does not authorize a debtor who is a consumer to enter into or modify an original contract in violation of the law of the location of the consumer".

81. **Mr. Winship** (United States of America) said that his delegation supported the proposal put forward by the delegation of France. Perhaps it would be advisable, for purposes of clarification, to insert a cross-reference to article 17 in article 6, which addressed party autonomy.

82. **Mr. Franken** (Germany) and **Mr. Markus** (Observer for Switzerland) endorsed the proposals made by the representatives of France and the United States.

83. **Mr. Chan** (Singapore) questioned whether it was appropriate to place the proposed text, which imposed a restriction on the debtor, in article 17, which covered the principle of debtor protection. The policy underlying the proposed amendment related rather to the preservation of the regulatory laws of the State.
84. **Mr. Bazinas** (Secretariat) said that, as he understood it, the intention was to ensure that if a debtor was not authorized by national consumer protection law to waive rights, then the Convention would not authorize it to do so. As that would seem to be a debtor protection issue, it would have its place in article 17.
85. **Mr. Chan** (Singapore) reiterated that the text as formulated constituted a restriction on, rather than protection of, the debtor. Perhaps the drafting group could find wording that would confine its effect.
86. **Ms. Mangklatanakul** (Thailand) said that the proposal put forward orally by France was somewhat difficult to follow. Perhaps it would be preferable to state in the chapeau of the article that the Convention was not intended to override national consumer protection legislation.
87. **Mr. Kobori** (Japan) said that reference to the habitual residence of the consumer, as in article 5 (h), would be more appropriate than reference to the law of the location of the consumer.
88. **Mr. Doyle** (Observer for Ireland) supported the view expressed by the representative of Singapore. The text proposed was not a principle of debtor protection.
89. **Mr. Bazinas** (Secretariat) said that the Commission might wish to decide whether to refer directly to the habitual residence of the consumer, or to rely on the secondary rule in article 5 (h).
90. **Mr. Deschamps** (Canada) noted that in paragraph 40 of document A/CN.9/491 the Secretariat had suggested the possibility of doing away with references to consumer protection in articles 21 and 23, by including in the Convention a general article worded along the following lines: "This Convention does not override law governing the protection of parties in transactions made for personal, family or household purposes". The adoption of such an approach would also obviate the need for such a reference in article 17. A similar approach was proposed by the Government of Canada in document A/CN.9/490/Add.5.
91. **The Chairman** noted that the proposal put forward by the representative of Canada was similar in thrust to the proposal submitted by the delegation of France. If the Commission agreed with the principle behind the proposals, it must decide whether to include the provision in article 17 or to make it the subject of a separate provision.
92. **Mr. Markus** (Observer for Switzerland) supported the proposal by Canada. Article 17 was not the only article that would affect consumer protection. Accordingly, the issue should be covered by a separate provision.
93. **Mr. Meena** (India) said that if the Commission believed that the Convention should not override original contracts in violation of the law of the location of the consumer, then clearly the modification was warranted.
94. **Mr. Chan** (Singapore) said that if the text of article 17 were to refer to consumers, then the Convention must also define the term "consumer". The proposal by Canada simplified matters, as it did not use that term. His delegation thus supported that proposal. Economy of language could be achieved by incorporating the formulation in article 4, paragraph 1 (a).
95. **Mr. Joko Smart** (Sierra Leone) said that article 17, which dealt with principles of debtor protection, was not the appropriate place for a provision on consumer protection.
96. **Ms. Brelrier** (France) said that her delegation could support the proposal made by the delegation of Canada.
97. **The Chairman** said that, on the understanding that the matter of consumer protection would be addressed in article 4, he would take it that the Commission wished to approve article 17.
98. *On that understanding, draft article 17 was approved.*
99. **The Chairman** said that the Commission had thus concluded its consideration of the Convention.
100. **Mr. Burman** (United States of America) paid tribute to the skill of the Chairman in guiding the Commission's deliberations to a successful conclusion.

The meeting rose at 5.05 p.m.